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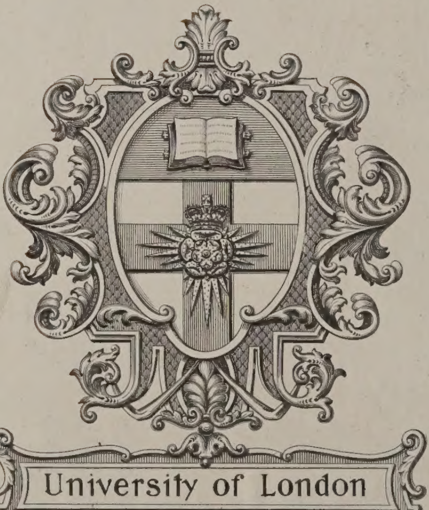

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1906.

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CASES

DETERMINED BY THE

PROBATE DIVORCE AND ADMIRALTY DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL FROM THAT DIVISION

AND BY THE

ECCLESIASTICAL COURTS.

1905—1906.

THE CIRCE.

1905
May 8, 17.

Admiralty—Collision—Damage—Both to blame—Life Claims—Spanish Law.

As the result of a collision between a Spanish and a French ship on the high seas the Spanish vessel sank, and some members of her crew were drowned. At the usual reference following on an agreement equivalent to both to blame, a claim against the owners of the French ship by the owners of the Spanish ship under the Admiralty rule of division of loss, for a moiety of certain sums paid, under Spanish law, to the representatives of the deceased seamen, was admitted. On appeal:—

Held, by Sir Gorell Barnes, President, that the claim must be disallowed, for if it was in respect of a payment made by way of indemnity, under a foreign statute, independent of any question of negligence, it was not recognized by English law; and if it was a claim for damages for loss of life, it did not come within the scope of the Admiralty rule of division of loss.

Motion in objection to the registrar's report.

The appellants (defendants and counter-claimants) were the owners of the *Circe*.

The respondents (plaintiffs) were the owners of the *Sestao*.

The case raised the question whether, in assessing, on the footing of both to blame, the amount of damage sustained by the plaintiffs, the owners of the *Sestao*, by reason of a collision between their vessel and the *Circe*, owned by the defendants, a claim for loss of life—due from the owners of the *Sestao* under Spanish law to the relatives of the deceased by way of indemnity—could be included.

On May 18, 1904, a collision occurred off the Longships between the Spanish steamship *Sestao* from Castro Urdiales to Cardiff with a cargo of ore, and the French steamship *Circe* from Cardiff to Caen with a cargo of coal. As a result of the collision the *Sestao* sank and five of her crew were drowned, whilst the *Circe* sustained considerable damage.

The owners of the *Sestao* commenced an action in rem against the owners of the *Circe*, to which the owners of the *Circe* put in a defence and counter-claim. On July 8 the action was settled by an agreement on the basis of both to blame in the following terms: "We, the undersigned solicitors for the plaintiffs and defendants respectively, hereby agree to settlement of this action on the basis of both vessels being to blame for the collision in question, and pray a reference to the registrar and merchants to assess the amount of damages." At the reference the plaintiffs and defendants put in claims which were duly agreed and assessed; but the owners of the *Sestao* subsequently filed a supplementary claim seeking to recover from the owners of the *Circe* a moiety of a sum of 164*l*. 17*s*. 10*d*., being the amount they had paid to the relatives of four members of the crew of the *Sestao* who were drowned, namely, a stoker, two firemen, and the steward. (1)

In support of the claim a Spanish Act was put in, under which the dependents of deceased workmen (including in that term persons employed in navigation) were entitled to compensation in the event of their death during their employment. (2)

---

(1) The sums alleged to have been paid were: To the children of the stoker, eighteen months' pay and keep less holidays, 1743·32 pesetas; to the widow of a fireman, one year's pay and keep, 1309·62 pesetas; to the widow of a fireman, two years' pay and keep, 2619·24 pesetas; to the sisters of the steward, 150·00 pesetas.

(2) According to the translation used in Court of the Labour Accident Act, January 30, 1900 (art. 2,

The registrar allowed the first three items of the claim on the ground stated in his report—that the plaintiffs were, by the above-mentioned Spanish law, " obliged to pay to the relatives of men injured or killed by accident when in their employment a specified indemnity. No limitation in the nature of that known to English law in respect of the negligence of fellow-workmen has been proved, and I take the Spanish law to be unlimited. Art. 2, sub-s. 8, refers to accidents in the course of navigation, and, therefore, I think the case differs from that of *The General Havelock* (1), recently decided by me, which

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s. 8, sub-s. 8): " Masters are liable for any accidents to their employees on account and in exercise of their profession or work unless the accident be due to force majeure alien to the work in which the accident is produced." Among the industries or work are included (art. 3) "the carriage and transport by land, sea, or river." The provision as to indemnity is that (art. 5): "If the accident causes the death of workmen, the masters are obliged to pay the expenses of the funeral and an indemnity to the wife and descendants under sixteen years of age, and ascendants according to the following rules: (1.) When the deceased leaves wife or children or grandchildren, a sum equal to the wages of two years. (2.) When the deceased leaves only children or grandchildren, a sum equal to eighteen months' wages. (3.) When deceased leaves only wife, but not descendants, the wages of one year. (4.) When deceased leaves father, grandfather, but not wife or descendants, and the former were above sixty years and without means, the wages of ten months."

(1) THE GENERAL HAVELOCK.

MOTION in objection to the registrar's report.

The appellants (defendants and counter-claimants) were R. M. Hudson and A. G. M. Hudson, owners of the British steamship *General Havelock*. The respondents (plaintiffs) were the Société Anonyme des Produits Chimiques, owners of the French steamship *Hélène*.

On May 28, 1904, a collision occurred in the North Sea between the plaintiffs' and defendants' steamships, and, on July 20, the solicitors for the respective parties signed the following "agreement of settlement":—

"We, the undersigned solicitors for the above-named plaintiffs and defendants respectively, hereby agree that the collision in question in this action was occasioned by the fault or default of the master and crew of the steamship *Hélène* and by the fault or default of the master and crew of the steamship *General Havelock*, and that the damages arising therefrom ought to be borne equally by the owners of the said steamship *Hélène* and by the owners of the said steamship *General Havelock*, and that the owners of the said steamship *General Havelock* should be condemned in a moiety of the plaintiffs' claim in respect of the said damages, and the owners of the steamship *Hélène* in a moiety of the involved a somewhat similar point—in other words, this claim would fall within the Admiralty class of damages referred to

---

defendants' counter-claim in respect of the said damages, and we pray a reference to the registrar, assisted by merchants, to assess the amount of such damages respectively."

On January 17, 1905, the registrar made his report disallowing a claim made upon the plaintiffs, the owners of the *Hélène*, by the defendants, the owners of the *General Havelock*, for a moiety of the sum paid by them for loss of life on board the *Hélène*, giving the following reasons:—

"This was a reference in regard to claims arising out of a collision between the French steamer *Hélène* and the steamship *General Havelock*, for which both vessels admitted their liability. In the claim of the defendants the only item in dispute was a claim for a moiety of the money paid by the owners of the *General Havelock* to the representatives of certain of the crew of the *Hélène*, who were drowned when the *Hélène* sank after the collision. This claim was settled for the sum of 1700*l*. I am of opinion that the defendants cannot claim a moiety of this sum against the owners of the *Hélène*. These are not, I think, damages arising out of the collision within the meaning and intention of the judgment in *The Frankland*, [1901] P. 161, which was the decision relied on by the defendants. In *The Frankland* it is obvious that the Court considered that there were two distinct classes of consequences following a collision, some of which were damages in respect of which a moiety is recoverable by one party against the other, and another class of non-recoverable payment. I think that the present claim falls into the non-recoverable or non-Admiralty class, and that the claim should be disallowed on this ground. There is, however, a further ground. The men who were drowned were the crew of the *Hélène*, and according to the decision in *The Bernina*, 12 P. D. 58, at p. 83, could not recover against the owners of the *Hélène*, because the collision was caused by the negligence of a fellow-servant. Further, one or more of these men may have been the actually negligent person. It is obvious, therefore, that if these men or their representatives could not recover against the owners of the *Hélène* in the first instance, part of the damages paid by the owners of the *General Havelock* to them cannot be recovered against the owners of the *Hélène* as part of the damages of the *General Havelock*."

On appeal:—

April 12. BARGRAVE DEANE J. affirmed the decision of the registrar, and dismissed the motion with costs on the following grounds:—This is an appeal from a decision of the registrar in a reference submitted to him by agreement between the solicitors for the owners of the *General Havelock* and the solicitors for the owners of the *Hélène*. The words of the agreement are important. [The learned judge read the agreement already set out, and continued:—]

It seems that since that agreement was drawn up a claim was made by the representatives of six of the crew of the *Hélène* who were drowned at the time of the collision. The action in respect of that, as I understand, could not be brought in a foreign in that case"; but the registrar disallowed the sum paid in respect of the steward, on the ground that the two sisters to whom the amount was paid were not dependent upon the deceased.

Laing, K.C., and *Stubbs*, for the appellants (defendants), owners of the *Circe*. In this case the plaintiffs' vessel is Spanish, the defendants' vessel is French, the collision happened on the high seas, and the proceedings are in rem before an English Court. Under these circumstances the owners of the *Sestao* are entitled to claim, under the agreement settling this

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Court against the owners of the *Hélène*, because the *Hélène* has gone to the bottom, but it has been brought in this Court against the owners of the *General Havelock* as one of the two vessels to blame. That clearly, whatever the law may be, was not within the view of the parties at the time this agreement was entered into, no claim had been made, and therefore you cannot import into an agreement a matter which had not arisen at the time that agreement was made. But it is said that the damages represented by the death of these men are damages which are included, because they are the direct result of this collision. I think they are not. My view is that, as a matter of fact, upon the reading of this agreement, the parties did not at the time intend these claims, which had not then been made, to be part of the agreement.

I go a step further. This claim is a claim under Lord Campbell's Act; but the claim under Lord Campbell's Act is a claim made on behalf of the crew of one of the wrong-doers. There is absolutely no evidence before the Court as to whether these members of the crew, for whose death the claim is made, are not tortfeasors themselves. Under Lord Campbell's Act there is no question of apportionment of loss between two wrong-doers. Under Lord Campbell's Act, if a widow brings an action, say, against a railway company for the loss of her husband through his being killed on the line, if once you establish negligence on the part of the dead man, there is no question of apportionment, there is no damage recoverable; and therefore, in this particular case, as it seems to me, until it is established that the people in question were not tortfeasors (in direct opposition to the words of the agreement, which admit that the accident was caused "by the fault or default of the master and crew of the *Hélène*"), these six men being part of the crew of the *Hélène*, I do not see how it is possible that it can be said that the owners of the *Hélène* could be called upon to pay part of this money which has been paid. My view is that the registrar's decision was right as to the facts, and as to the law.

Aspinall, K.C., and *Cambier*, for appellants (defendants).

Laing, K.C., and *Stubbs*, for respondents (plaintiffs).

Solicitors: *Downing, Handcock, Middleton & Lewis, for Bolam, Middleton & Co., Sunderland; Stokes & Stokes.*

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action on the basis of both vessels being to blame, the damages arising out of the collision, and which necessarily flow from the negligence of the defendants; but the question what damages are recoverable under the agreement, which is equivalent to a decree of both to blame, is to be decided by the lex fori, and not by the law of the country to which one or other of the vessels may belong—in other words, the result of the agreement is that the amount of damages recoverable is to be decided according to the Admiralty rule as to division of loss.

At the supplementary reference the witness for the plaintiffs who produced the Spanish Act of 1900 was unable to say whether, if a deceased seaman had himself been guilty of negligence causing his death, the owners would be liable to pay any compensation, nor did he know if that would be the case if any of his fellow-servants had through their negligence caused his death; but the agreement made between the parties implies that the crew of the *Sestao* were guilty of negligence, and, according to English law, they therefore could not recover compensation.

In the case of *The General Havelock* (1), where a collision occurred between a British and a French vessel, and the French vessel was sunk, it was held, in an action in personam, that the particular damages were not contemplated in the special agreement made between the parties, but the claim was also disallowed on the ground that the men who were drowned were the crew of the French ship, and could not recover against the owners of that vessel, because the collision was—according to the terms of the agreement of both to blame—caused by the negligence of themselves or their fellow-servants. The registrar says that this case differs from that case, in that these come within the Admiralty class of damages because the Spanish law applies to seamen; but so does Lord Campbell's Act, and the Spanish Act seems to be somewhat analogous to our Workmen's Compensation Act, and has nothing to do with damage done by a ship.

A claim for loss of life can only be made under Lord Campbell's Act, and if made against the owners of the *Sestao* the answer would be that if there was no fault on the part of the

(1) Ante, p. 3, n. (1).

Sestao then there was no liability, as the claim must be based on negligence; and if the vessel was to blame, then the claim would fail by reason of the doctrine of common employment, even if the deceased men had not been personally negligent.

The plaintiffs here cannot be in a better position than if they had paid claims for damages under Lord Campbell's Act, and were seeking to recover half the amount so paid from the defendants.

[They were stopped by the Court.]

Aspinall, K.C., and *Dawson Miller*, for the respondents (plaintiffs), the owners of the *Sestao*. In *The General Havelock* (1) the decision turned on the precise wording of the agreement under which the deceased members of the crew might have been the cause of the collision; but here the affidavit of the master shews that the members of the crew were not concerned with the navigation; and in *The Bernina* (2), in which the doctrine of identification was exploded, it was held that the representatives of the deceased member of the crew and a passenger, neither of whom had anything to do with the navigation, could bring actions in personam for negligence in Admiralty under Lord Campbell's Act against the owners of the wrong-doing vessel.

In the case of both vessels being to blame, the principle of the rule as to division of loss is in the words—quoted by Marsden in discussing the rule (3)—of Selborne L.C. in *Stoomvaart Maatschappy Nederland* v. *Peninsular and Oriental Steam Navigation Co.* (4): "equality of participation in the loss arising from a common fault." In that case the House of Lords was dealing with property, but the rule is equally applicable to life, for it is a loss caused by collision. By the Judicature Act, 1873, s. 25, sub-s. 9, in any cause or proceeding for damages arising out of a collision between two ships, if both ships shall be found to have been in fault, the rules in force in the Court of Admiralty shall prevail.

Here, as the result of the collision, an obligation was imposed by statute upon the Spanish shipowner. This was a loss caused by collision, and in the words of the late President (Sir F. H. Jeune) in *The Frankland* (1)—when dealing with a question of consequential damage in a case where both ships were to blame—"all damages arising out of the collision are to be divided equally."

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(1) Ante, p. 3, n. (1).

(2) (1888) 13 App. Cas. 1.

(3) Collisions at Sea, 5th ed. (1904), p. 123.

(4) (1882) 7 App. Cas. 795, at p. 801.

Laing, K.C., in reply. In the present case the claim is not under Lord Campbell's Act, but under a Spanish Act which forces a policy of insurance on the owner of the ship, so that the loss arises from the mere fact of employment. In *Taylor* v. *Dewar* (2) a running-down clause expressed to cover damages which the assured ship would be compelled to pay for running down and damaging another ship was held not to include damages recovered against the insured ship by the representatives of persons on board the other ship who lost their lives in the collision. It is true that in *The Franconia* (3) it was held that the Admiralty Court had jurisdiction to entertain proceedings in rem against a ship for damages for loss of life; but this was overruled in *The Vera Cruz* (*No.* 2) (4), where an action in rem against a foreign ship under Lord Campbell's Act was held not to be within the Admiralty Court Act, 1861: see the reasoning of Bowen L.J. in his judgment. (5)

Cur. adv. vult.

May 17. SIR GORELL BARNES, PRESIDENT. [After dealing with the facts of the case, and referring to the terms of the agreement between the owners of the respective ships, and to the supplementary claim in respect of the deceased members of the crew of the *Sestao*, the learned judge read the material portion of the report of the registrar, and the sections of the Spanish Accident Act, 1900, already set out, and continued:—] The class of claim which apparently has been paid by the owners of the Spanish ship is not a class of claim which could be made or recognized by English law. If the claim had been made against an English ship by the representatives of persons drowned in consequence of a collision in which the ship they were on was concerned, and there was no fault on the part of that ship, then they would have no claim against the owners; but if there was fault for which the persons drowned were not individually responsible, still, according to the doctrine of common employment, their representatives would have no remedy against the owners of that ship. Therefore the position of persons who could make a claim at all would be this—they could only make a claim against the owners of the vessel which came into collision with the vessel on which the parties drowned were. Now, if a claim could be made against the other vessel it would be made by virtue of Lord Campbell's Act. That was decided in *The Bernina* (1), otherwise known as *Mills* v. *Armstrong.* (1) That was a case where, a collision having occurred between the steamships *Bushire* and *Bernina* through the fault or default of the masters and crews of both, two persons on board the *Bushire* —one of the crew and a passenger—neither of whom had anything to do with the negligent navigation, were drowned. The representatives of the deceased having brought in the Admiralty Division actions in personam against the owners of the *Bernina* for negligence under Lord Campbell's Act, it was held, in the House of Lords, affirming the decision of the Court of Appeal, that the deceased persons were not identified in respect of the negligence with those navigating the *Bushire;* that their representatives could maintain the actions, and could recover the whole of the damages, the Admiralty rule as to half damages not being applicable to actions under Lord Campbell's Act. The report of the case in the House of Lords does not deal fully with the question of half damages, because at p. 3 of the report it is stated that "the question upon the Admiralty rule as to half damages was mentioned by the appellant's counsel, but was not argued before this House." When, however, the report of the case in the Court of Appeal (2) is turned to, it will be found that that matter was fully considered. In the course of his judgment Lord Esher M.R. said: "We must state that, for the reasons given by Butt J., we are in accord with him in saying that actions brought under Lord Campbell's Act are not Admiralty actions at all; that they are pure common

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(1) [1901] P. 161, at p. 166.

(2) (1864) 5 B. & S. 58.

(3) (1887) 2 P. D. 163.

(4) (1884) 9 P. D. 96.

(5) 9 P. D. at p. 100.

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(1) 13 App. Cas. 1.

(2) (1886) 12 P. D. 58, at pp. 83, 84, 95.

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law actions; that they are not touched by the Judicature Act, 1873, s. 25, sub-s. 9; that they are to be ruled in every respect by the common law. We desire to say that we do not express in this judgment any opinion as to whether an action brought at common law in respect to damage to cargo will, by virtue of the above section, be governed by the Admiralty practice laid down in the case of *The Milan* (1), or whether the application of the section is to be limited to actions for injury to one of two ships, or to both, by a collision between them; or whether even in an Admiralty action by an owner of cargo the whole of the judgment in that case will ultimately be upheld." Lindley L.J. said: "The provision of Lord Campbell's Act as to damages was wholly inapplicable to the Court of Admiralty when the Act was passed. At that time no action for damages in the then technical sense of the expression could be brought in the Court of Admiralty. Moreover, that Court did not consist of a judge and jury, nor had it any machinery for summoning juries by whom damages could be assessed, or by whom damages could be divided amongst persons beneficially entitled to them by the statute. Although, therefore, actions under Lord Campbell's Act can now be brought in the Admiralty Division of the High Court, it is plain that the damages must be assessed by a jury, as directed by the statute, and not by the judge, with or without other assistance, according to the rules which are usually applied in that Court in cases of collision. When the Judicature Acts passed, the Court of Admiralty had no rules applicable to actions brought under Lord Campbell's Act, simply because that Court had no jurisdiction to try such cases. It follows as a consequence that, whether we regard the right to sue or whether we regard the damages to be recovered in actions founded on Lord Campbell's Act, it is impossible to comply with clause 9 of s. 25 of the Judicature Act of 1873. It is manifest that this clause in the Judicature Act has no application to such actions, although it does apply to ordinary actions for collision at sea." Lopes L.J. said very much the same thing: "First, is the Admiralty rule as to joint liability for joint negligence applicable to this case? According to the Admiralty rule, when both vessels are to blame, the owners and cargo-owners of each can recover half their loss from the other. This rule, before the Judicature Acts, clearly did not apply to claims brought by passengers or by representatives of deceased passengers under Lord Campbell's Act. Such claims were not brought in the Admiralty Court at all, because there was no question of maritime lien, but were brought in a Court of common law, in which the ordinary rule as to contributory negligence was in force. Since the Judicature Acts, the Probate, Divorce, and Admiralty Division has jurisdiction concurrent with the other Divisions to try claims of this kind. Whether the Admiralty rule as to joint liability for joint negligence applies to this class of cases depends on s. 25 of the Judicature Act, 1873, sub-s. 9. It is in these words: 'In any case in proceedings for damages arising out of a collision between two ships, if both ships shall have been found to have been in fault, the rules hitherto in force in the Court of Admiralty, so far as they have been at variance with the rules in force in the Courts of common law, shall prevail.' The rule in Admiralty was only to prevail so far as it conflicted with the rule of common law. But there never was any conflict between the Admiralty and the common law rule. On the principle 'Actio personalis moritur cum personâ,' none of these actions could be maintained before the passing of Lord Campbell's Act, and could not have been brought in the Admiralty Court before the passing of the Judicature Acts, when the Admiralty Court became a branch of the High Court. It is clear, too, from Lord Campbell's Act that that Act was never intended to apply to a Court where there was no machinery for a trial by jury, and where the damages could not be assessed by a jury. I am clear, therefore, that the Admiralty rule as to joint liability for joint negligence does not apply to the present cases."

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(1) (1861) Lush. 388.

The reasoning on which that case proceeds is also supported by the view of the Court of Appeal in *The Vera Cruz.* (1) That was a case in which Butt J. had held that an action in rem would lie under Lord Campbell's Act. In the Court of Appeal

(1) 9 P. D. 96, at p. 100.

it was said that the action was not within the Admiralty Court Act, 1861, and, therefore, the Admiralty Division had not jurisdiction over such an action. There is one passage in the judgments which it is material—with reference to the present case—to consider. Although it is to be found in each of the judgments, I think it is most conveniently put by Bowen L.J.: "Shortly, the question is, whether this is a claim for damage done by a ship, and I think that the history of the law on this point proves that it is not. Apart from that, however, the obvious meaning of the Act leads to the same conclusion—for the Act gives a claim for compensation for damage done by the ship—this, and this only, is the cause of action. 'Done by a ship' means done by those in charge of a ship, with the ship as the noxious instrument. The plaintiff is in this dilemma. The only claim that can arise must either be a claim for the killing of the deceased, or the injuriously affecting his family. The killing of the deceased per se gives no right of action at all, either at law or under Lord Campbell's Act. But if the claim be, as it only can be, for the injuriously affecting the interests of the dead man's family, the injurious affecting of their interests is not done by the ship in the above sense. It arises partly from the death which the ship causes, and partly from a combination of circumstances, pecuniary or other, with which the ship has nothing to do. The injury done to the family cannot, therefore, be said to be done by the ship." Before I pass from the case of *The Vera Cruz* (1) I may say that that case went to the House of Lords (2), and the decision of the Court of Appeal was affirmed.

It is clear, therefore, in regard to cases of this character, that in England the persons who represent these deceased seamen could make no claim against their own ship. They could make a claim against the other ship, but they would claim then in the ordinary way under Lord Campbell's Act. They would recover damages in full, and, if it was sought to apply the Admiralty rule, I suppose it would only be sought to apply it by the defendants themselves seeking to obtain from the other ship a contribution on the basis of both being to blame. I think that

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(1) 9 P. D. 96, at p. 100.

(2) (1884) 10 App. Cas. 59.

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was the claim in *The General Havelock* (1), which failed, though the judgment in that case appears to have proceeded upon special reasons—apparently on the ground of an agreement that was entered into—but to my mind there would be no justification whatever for an attempt to make the other vessel pay half of the damages, because the Admiralty rule is not applicable to it at all. It has nothing to do with such a subject, because it was not part of the damages which could be dealt with or even taken into consideration in the Admiralty Court.

If one, therefore, turns to the present claim, in the first place it is a claim which is not for damages in the true sense. It is merely a claim under a foreign statute by the owners of the ship, which appears to be made independently of any question of negligence. It appears to be made because by an Act, which is somewhat analogous to the Workmen's Compensation Act, certain obligations are imposed upon the owners of the ship, which obligations are independent, it seems to me, of the question whether there was any blame or not on the part of those in charge of that ship. Then, again, if one passed from that point and were to treat the claim as damages, which could be recovered against any ship in fault, possibly they might make a claim out against their own ship, if the master was in fault, according to foreign law, and perhaps in this country; but then that would still not be a claim for damages such as could be made in the Admiralty Court, to which the division of loss rule applies. Anybody who has taken the trouble to follow the history of that rule will see how inapplicable it is to a case of this character. There is a most admirable chapter on this subject in the recent edition of Mr. Marsden's book, where the rule is traced from the Laws of Oleron, and where it is shewn how that rule has been varied and acted upon in all sorts of different ways, possibly originating in a case of contribution between two ships where neither was in fault, and later being applied where the judges were uncertain which vessel was in fault, and thought it a fair thing to divide the loss. Mr. Marsden also points out how the rule was developed, and from being treated as rusticum judicium has crystallized into the form in which it is usually applied in

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(1) Ante, p. 3, n. (1).

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this Court—if not almost daily, certainly very frequently—to ships and cargoes. It has never yet, however, so far as I am aware, been applied to claims which have been put forward by persons representing others who have been drowned or killed in a collision between two ships. No case was cited to me in which the rule had been applied, and I do not think any case has been made out by the persons who, upon this report, have succeeded in recovering half the damages, justifying them in so recovering. Therefore these half damages must be excluded from the plaintiffs' claim, and this motion, which was made on behalf of the defendants, in my judgment must succeed.

Appeal allowed with costs.

Solicitors for appellants (defendants): *Stokes & Stokes.*

Solicitors for respondents (plaintiffs): *William A. Crump & Son.*

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Oct. 30;
Nov. 9.

THE MARPESSA.

Admiralty—Collision—Demurrage of Dredger—Measure of Damage.

In ascertaining, on the principle laid down in *The Greta Holme*, [1897] A. C. 596, the measure of damage sustained by a dock board deriving their funds from rates, and charged with the duty of maintaining a harbour, but not entitled to distribute profits, the Court will, as between the plaintiff board and the defendant wrong-doers, in the case of a collision with a dredger owned by the plaintiffs and damaged by the negligence of the defendants' servants, award—in the absence of proof of direct pecuniary loss in respect of that part of their claim which is in the nature of demurrage—such a sum as will be sufficient to compensate the board for the actual out-of-pocket expenses properly chargeable against the dredger during the period of her detention for repairs, together with depreciation and loss of interest on capital during the delay, such depreciation and interest being calculated on the capital value of the dredger at the time of the accident.

MOTION in objection to the report of the district registrar of Liverpool.

The appellants (plaintiffs) were the Mersey Docks and Harbour Board, owners of the *G. B. Crow.* The respondents (defendants) were the owners of the *Marpessa.*

The case raised the question: On what principle a claim in the nature of demurrage for the temporary loss of the use of a dredger damaged by collision is to be calculated.

The *G. B. Crow*, owned by the plaintiffs, is a suction dredger, built in 1895 at a cost of 56,700*l.*, and was designed for, and is employed in, the dredging of the bar and the sea channels of the river Mersey as part of the conservancy work of the dock board. She is one of the three largest dredgers in Europe, all owned by the plaintiffs. She is capable of carrying 3000 tons of sand to the dumping-ground, and can dredge to a depth of fifty-five feet. She can be filled in about twenty minutes, and her average output is 12,800 tons per day at an estimated cost of a fraction over 2*d.* per ton of sand raised. She works continuously night and day throughout the year except Sundays, Christmas Day, and Good Friday, but is occasionally prevented from working for a day or so by stress of weather.

On October 6, 1904, whilst the *G. B. Crow* was sheltering from the weather in the river Mersey, she was run into by the steamship *Marpessa*, owned by the defendants, and sustained the damage which formed the subject of the plaintiffs' claim. Her value, allowing for depreciation at 7 per cent., was estimated at the time of the collision at 33,736*l.*, and her life was considered to be good for some five or six years longer.

The action of damage by collision brought by the Mersey Docks and Harbour Board was settled on the defendants, the owners of the *Marpessa*, admitting liability to the extent of 90 per cent., subject to the usual reference, and the plaintiffs filed particulars of their claim amounting to 1275*l.* 12*s.* 6*d.* It consisted of eleven items, all of which were agreed except the last item of 936*l.*, being demurrage for nine days at 104*l.* per day.

According to the evidence of the engineer of the dock board given at the reference, "the services of the dredgers are indispensable to the port in order to maintain its present condition," and "to replace them the board would have to do the best they could in the way of hire, or the alternative would be for the port to suffer prejudice and damage." In 1901 a sand-pump suction dredger, called the *Laga*, valued at 13,000*l.*, and capable of carrying only 650 tons, or an output of 2750 tons per day, representing a cost of 3*d.* per ton of sand raised, was hired for 232 working days to replace one of the board's own vessels. In addition to 85*l.* per week for the hire of the *Laga*, the dock board paid for insurance 591*l.* 15*s.* 1*d.*; repairs, 1338*l.* 4*s.* 11*d.*; wages, 1409*l.* 0*s.* 8*d.*; supplies, 941*l.* 16*s.* 5*d.*; and superintendence, 276*l.* 13*s.* 7*d.*; together, 4557*l.* 10*s.* 8*d.*, or (exclusive of the charge for hire) 19*l.* 12*s.* 10*d.* per day, representing an owners' profit per week of 67*l.* 10*s.*, or 27 per cent. per annum on the value of the vessel after allowing for depreciation at the rate of 7 per cent., or 17*l.* 10*s.* per week; whilst on similar lines, in the case of the *G. B. Crow*, the rate per working day was calculated at—(1.) insurance, 3*l.* 7*s.* (less 1*s.* rebate); (2.) repairs, 10*l.* 2*s.* 4*d.*; (3.) wages, 14*l.* 2*s.* 4*d.*; (4.) supplies, 17*l.* 6*s.* 3*d.*; (5.) depreciation (7 per cent. on 56,700*l.*), 12*l.* 12*s.* 3*d.*; (6.) owners' profit (25 per cent. on 56,700*l.*), 45*l.* 0*s.* 7*d.*; (7.) superintendence and general charges of engineer's department (7½ per cent. on total cost of repairs, wages, and supplies), included in (2.), (3.) and (4.); total, 102*l.* 9*s.* 5*d.*; but the witness could not say, and thought "it extremely doubtful whether any vessel suffered any detriment from the fact" that the *G. B. Crow* was not available for the nine days during which demurrage was claimed, and he admitted that "the harbour authorities could only suffer through the vessels;" but the way he measured the damage was "that the board considered it desirable to build such dredgers in the interests of the port. They considered it desirable to maintain these dredgers constantly working, year in and year out, and if they are deprived of their services they are deprived of the advantage which the use of the dredgers brings them;" or, in other words, unless the expenditure was incurred, the port would revert to the condition of 1890, when there was at low-water spring tides only ten feet on the bar, whereas now there were, with slight variations, twenty-seven feet. By the fact of incurring the expenditure the board have "produced this improvement in the port, and therefore its value to the port must be at least the expenditure which has been incurred in producing it."

In respect of the claim of 936*l.* for demurrage, the district registrar allowed only 315*l.*, or 35*l.* per day, assigning in his report, dated July 13, 1905, the following reasons:—

"The only item in the claim which was disputed was No. 11, and the dispute resolved itself into the question of the principle on which demurrage should be calculated. The plaintiffs in the claim, as filed, charged 104*l.* per day for demurrage, but at the reference they reduced this amount to 102*l.* 9*s.* 5*d.* There was no dispute as to the number of days for which the defendants were liable to pay demurrage.

"Counsel for the plaintiffs contended that the value per day of the vessel to the plaintiffs was the amount which they considered it proper to expend on her for maintenance and working expenses in addition to sums to cover insurance, depreciation, and owners' profits, and the engineer to the dock board was called to prove these amounts. This witness had prepared a statement showing the annual cost for the past nine years under the following heads: insurance, repairs, wages, supplies, depreciation, and expenses of engineer's department, together with a charge to represent owners' profits. The amount claimed by the dock board, 102*l.* 9*s.* 5*d.*, represented the average expenditure per day, during that period, in maintaining and working this vessel, including a charge of 25 per cent. for owners' profits. The figures of expenditure were not seriously disputed by the defendants, but they contended that the principle was wrong, and that, in addition to the amount to be allowed for standing expenses, as distinguished from working expenses, namely:—insurance, wages, and a sum to cover depreciation—the plaintiffs were not entitled to anything further except owners' profits, which they contended were, in this case, covered by interest on the present value, and some amount to represent general damage, and, in support of their contention, defendants' counsel relied on the judgment of Lord Herschell in *The Greta Holme.* (1)

"On the question of general damages, counsel for the defendants contended that the plaintiffs were only entitled to a nominal amount, as the plaintiffs were deprived of the use of their vessel for only nine days, and the engineer to the dock board, in his

(1) [1897] A. C. 596, at p. 604.

evidence, admitted that he could not point to any injury or inconvenience occasioned by the loss of the services of the vessel.

"I am of opinion that the principle contended for by the dock board is not one that should be adopted, and, furthermore, I think that the claim of 25 per cent. for owners' profits, calculated on the original outlay, is excessive.

"In arriving at the amount to be allowed, the merchants and I considered that, in view of the fact that, according to the figures of the engineer to the dock board, a sum of 33,736*l*. is standing to the depreciation account of this vessel, which originally cost 56,700*l*., the plaintiffs are only entitled to a percentage calculated on the depreciated value, in which we have included 9427*l*. expended last year, and not charged under the head of repairs in the statement of the engineer to the dock board above referred to.

"Furthermore, the plaintiffs are paying not more than 4 per cent. on their outlay, and the merchants and I are of opinion that 7 per cent. calculated on the depreciated value as above, is a proper allowance to make to cover establishment charges, owners' profits, and general damage.

"In addition to this we have allowed the standing expenses substantially on the basis of the figures of the engineer to the dock board, and we consider that 35*l*. per day is a proper allowance to cover the whole of the plaintiffs' loss, which sum would include any supplies consumed while the vessel was under repair."

By a further report, dated October 26, 1905, the district registrar, in stating how the figure of 35*l*. per day was arrived at, explained that:—

"The plaintiffs based their claim solely upon the principle: that the value per day of the vessel to them was what they 'thought worth while' to spend upon her, and then evidence was practically limited to a justification of this principle and corroboration and explanation of the figures contained in the statement of working expenses prepared by their engineer, upon which their claim of 102*l*. 9*s*. 5*d*. per day was arrived at.

"The merchants and I being of opinion that the principle was wrong, dealt with the engineer's figures upon the lines laid out by Lord Herschell in the case of *The Greta Holme.* (1)

"In the absence of evidence of the actual expenses incurred by the plaintiffs during the time the vessel was laid up, the merchants and I, in arriving at the amount to be allowed, could only deal with the figures contained in the engineer's statement."

With reference to "supplies" the report stated that "This figure is largely in excess of what the merchants considered would have been expended in supplies to a vessel in dock, but a liberal allowance has been made to cover superintendence and sundries."

No allowance was made in respect of "repairs," as the defendants were paying for the repairs rendered necessary by the collision. Graving dock rates and superintendence and other general charges, which in ordinary course would be included in the engineer's figures under the head of "repairs," were admitted by the defendants and allowed as separate items in the claim.

In the result the allowance was as follows: insurance, 3*l.* 7*s.*; wages, 14*l.* 2*s.*; supplies, 5*l.* 3*s.*; depreciation, 6*l.* 4*s.*; owners' profit, 4 per cent.; general damage and establishment charges, 3 per cent., 6*l.* 4*s.*; total, 35*l.*

Aspinall, K.C., and *Leslie Scott*, for the appellants (plaintiffs), the Mersey Docks and Harbour Board. The ground of objection to the report of the district registrar is that the award to the plaintiffs of the sum of 315*l.*, or 35*l.* per day, in respect of item No. 11, is inadequate as compensation for the loss the plaintiffs have suffered by reason of being deprived of the services of the dredger. The registrar, in assessing the value, failed to take into account, as a measure of the vessel's value to the plaintiffs, her daily capacity as a dredging machine for removing and transporting sand from the bar and sea channels of the river Mersey under the plaintiffs' conservancy powers and duties. These services are very valuable to them for improving the navigation and increasing the facilities of the port, and the proper measure of compensation is the loss by the plaintiffs of the daily or current value to them of the *G. B. Crow.* The

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(1) [1897] A. C. 596, at pp. 604, 605.

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basis upon which the plaintiffs stated their claim, correctly shewed that the true daily value was represented by the sum of 102*l.* 9*s.* 5*d.*, for, as contended before the district registrar, the value per day of the vessel to the plaintiffs was the amount which they considered it proper to expend on her for maintenance and working expenses, in addition to sums to cover insurance, depreciation, and owners' profits.

The district registrar was also wrong in disregarding the evidence given by the plaintiffs as to the value to let of such a vessel as the *G. B. Crow*. For the purpose of considering the cost of hiring vessels of this special and peculiar kind, so as to arrive at the value, the charterparty of the *Laga*, together with the other evidence adduced, afforded a proper basis of comparison after making allowance for the *Laga* being a very inefficient substitute for a dredger such as now in use by the dock board. On this question of hiring, the remarks of Lord Herschell in *The Greta Holme* (1) are material: "If the appellants had hired a dredger instead of purchasing one, and had during the months they were deprived of its use been bound to pay for its hire, it cannot be doubted that the sums so paid could have been recovered. How can they the less be entitled to damages because instead of hiring a dredger, they invested the money in its purchase? The money so invested was out of their pockets, and they were deprived of the use of the dredger to obtain which they had sacrificed the interest on the money spent on its purchase."

No doubt prior to *The Greta Holme* (2) it was difficult for a corporation in the position of the plaintiffs to establish a claim for damages in the nature of demurrage, but in that case it was held that the owners of a dredger, although not out of pocket in any definite sum, were entitled to recover damages for the loss of the use of the dredger, and Lord Halsbury L.C. said: "It is difficult to see upon what ground the legal character filled by the appellants here can affect the question whether they are entitled to recover damages for being deprived of the use of their dredger during the period the dredger was being repaired. That the dredger was required for their use cannot

(1) [1897] A. C, 596, at p. 605.

(2) Ibid. 596.

be denied; that their operations in reducing the silting up were delayed by the loss of it cannot be denied."

In *The Harmonides* (1) it was held that in estimating the value of a vessel at the time of a collision, whereby she was lost, the test, in the absence of a market value, is what the vessel was fairly worth to her owners from a business point of view; and so, in this case, though there may be no market, the value of the dredger can be ascertained by reference to the various heads under which the engineer to the dock board, in his evidence, has estimated that value. It may be that the word "depreciation" is not exactly the right expression to use in the case of a dredger for which there is no market; but, in the result, for the purposes of the present calculation, the word indicates what must be the true view, viz., that the owner of a craft of this description should lay by such a sum as will enable him at the end of its life to purchase another as good or better. So again, criticism has been offered to the heading "owners' profits" in the statement of working expenses prepared by the same engineer, and, as a consequence of the view accepted by the district registrar, the allowance made by him under this head, both as to amount and percentage, is insufficient and ought to have been based upon capital cost, and not upon depreciated value.

Again, the word "demurrage" may not be quite precise in a case of this description, and a better mode of expressing what is meant would perhaps be to say, that what is claimed is the loss sustained by reason of being deprived of the use of the vessel; but evidence in respect of the actual nine days during which the appellants were deprived of the use of the vessel was not material, for the question was, what was the average cost per day in the case of this dredger, and on this point the particulars furnished by the plaintiffs were very precise.

With regard to the question of interest on capital, Sir James Hannen, in *The Harrington* (2), said: "The conservators contend, and contend rightly, that the cost to which they have been put in providing this apparatus—that is to say, the interest on the

(1) [1903] P. 1.

(2) (1888) 13 P. D. 48 (more fully in 6 Asp. M. L. C. 282).

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capital invested in it—must be taken into account in estimating the charges and expenses incurred in raising a particular wreck"; and Lord Esher, when commenting in *The Greta Holme* (1) on this passage, says, "Sir James Hannen laid down, for the purpose of getting at the cost price, that there should be taken into account the capital invested in the apparatus provided for the purpose. Is that the value of the apparatus at the moment the apparatus is used? Counsel for the respondents says that it is. I do not agree with them; it is what they originally cost." A. L. Smith L.J. (2) in his judgment takes the same view, and, on this point, there was no appeal.

Pickford, K.C., and *Greer*, for the respondents (defendants), owners of the *Marpessa*. The actual damage to be made good is not an item disputed by the respondents, nor is it contended that the legal character filled by the appellants affects the question whether they are entitled to recover damages for being deprived of the use of their dredger during the period the vessel was being repaired; but it is submitted that, as found by the district registrar, the principle upon which they have based their calculation in respect of item No. 11 is wrong, for it is not material what expenditure the board consider it worth while to incur—that is to say, the value of the dredger at the time in question was not what they considered it proper to expend upon her for maintenance and working expenses, in addition to sums to cover insurance, depreciation, and owners' profit, and it does not follow that the larger the expenditure the larger the benefit, the real point being what is the loss the appellants have sustained by being deprived of this particular dredger during a period of nine days, and the appellants have not shown that the bar was damaged to an extent represented by nine times 102*l.* 9*s.* 5*d.* In *The Greta Holme* (3) the claim was for 1500*l.*, being a sum calculated at the rate of 100*l.* per week for fifteen weeks during which the dredger was under repair, and a further sum of 91*l.* 8*s.* 6*d.* as an allowance for a further period of sixteen days during which she could only be partly used; but the learned law Lords deemed this excessive, and reduced the amount to 500*l.* In the present case the respondents are content to adopt the sum of 315*l.* arrived at by the district registrar as a reasonable assessment, though it is quite possible that the delay of nine days did not substantially affect the ultimate result of the work.

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(1) [1896] P. 192, at p. 202.

(2) Ibid. 206.

(3) [1897] A. C. 596.

Again, it may be that the appellants are placed in a difficulty in proving what was the actual loss; but to make a charge in respect of wages and supplies which were not expended is fallacious. It appears to have been based on an assumed average; but no evidence was forthcoming of any ascertained sums expended during the period the dredger was being repaired. The figures set out by the engineer to the dock board are mere speculation, and are not a measure of the loss to the board. So the original cost is not the proper basis for calculation, but the present value of the plant employed, and Sir James Hannen's words in *The Harrington* (1) must be so interpreted, as appears from the registrar's report upon which the judgment was given. In this case the dock board had a vessel originally costing 56,700*l.*, from which, for nine days, they were not getting any return in the way of work, and the measure of their loss in this respect is the interest on the capital invested, say 4 per cent., on the value of the vessel at the time of the accident.

Aspinall, K.C., in reply.

Cur. adv. vult.

November **9.** Sir Gorell Barnes, President. This was a motion in objection to the report of the district registrar at Liverpool upon a reference in an action brought by the Mersey Docks and Harbour Board, owners of the sand-pump dredger *G. B. Crow*, as plaintiffs, against the owners of the steamship *Marpessa*, defendants, so far as the same awards the sum of 315*l.*, or 35*l.* per day, to the plaintiffs in respect of item No. 11 in the particulars of the plaintiffs' claim, and finds that the plaintiffs should bear the costs of the reference.

The claim arose out of a collision between the dredger *G. B. Crow* and the steamship *Marpessa* in the river Mersey in

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(1) 13 P.D. 48.

October, 1904. The defendants admitted liability to the extent of 90 per cent. of the plaintiffs' claim, to be assessed in the usual way. The only item in the claim which was disputed was No. 11, and the dispute resolved itself into a question of the principle upon which demurrage for the detention of the dredger should be calculated. The claim for demurrage was for nine days at 104*l*. per day, making in all 936*l*., of which the district registrar has allowed 315*l*.

The *G. B. Crow* is a suction dredger employed in dredging operations at the bar at the entrance to the river Mersey, and is a valuable vessel for the purpose. She is one of the three largest dredgers in Europe, the other two being also owned by the plaintiffs. On the occasion of the collision the dredger was sheltering from the weather, but would have been set to work again immediately after the weather moderated. This dredger was built in the year 1895, and, according to the evidence, her life would have been about fifteen years, so that she had about five or six years more work in her. In consequence of the collision she was delayed nine days undergoing repairs, and her use to the plaintiffs was lost during that time, unless any part of the period would have been affected by her being prevented from being used by the weather.

The contention on the part of the plaintiffs was that the value of the dredger to them at the time in question was the amount which they considered it proper to expend on her for maintenance and working expenses, in addition to sums to cover insurance, depreciation and owners' profit, and upon this basis the actual claim presented at the reference amounted to 102*l*. 9*s*. 5*d*. per day.

The contention on the part of the defendants was that the principle upon which the plaintiffs' claim was put forward was wrong, and that the claim ought to have been based upon the principle indicated in the judgment in the House of Lords in the case of *The Greta Holme*. (1) In that case, owing to a collision with a ship, a steam dredger belonging to the present plaintiffs was injured, and the owners were deprived of the use of it for some weeks, and the dredging works were delayed. A claim was made for 1500*l.*, being a sum calculated at the rate of 100*l.* per week for the fifteen weeks during which the dredger was under repair and could not be used for any purpose by her owners, and 91*l.* 8*s.* 6*d.* as an allowance for a period of sixteen days, during which she could only be used as a hopper barge. The registrar reported against both those items of claim, and his report was sustained by the President of the Probate Division, whose decision was affirmed by the Court of Appeal, but the decision was reversed by the House of Lords as to these items of damage, and a sum of 500*l.* was fixed upon by the learned Lords.

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(1) [1897] A. C. 596.

The broad contention on the part of the defendants in that case was that the plaintiffs could not recover any damages for the loss of the use of the dredger, but the learned Lords held that the plaintiffs were entitled to recover damages, and perhaps the nearest indication of the principle upon which these damages should be assessed is to be found in the judgment of Lord Herschell (1) where he says: "How can they the less be entitled to damages because, instead of hiring a dredger, they invested their money in its purchase? The money so invested was out of their pockets, and they were deprived of the use of the dredger, to obtain which they had sacrificed the interest on the money spent on its purchase. A sum equivalent to this, at least, they must surely be entitled to; but I think they are also entitled to general damages in respect of the delay and prejudice caused to them in carrying out the works entrusted to them. It is true these damages cannot be measured by any scale; but that would be equally true in the case of damages in respect of the deprivation of an individual of a chattel which he had purchased for purposes of comfort and not profit."

The district registrar has considered that the basis upon which the plaintiffs in the present case have put forward their claim is erroneous, and has, in substance, based the allowance which he has made to the plaintiffs upon the principle indicated by Lord Herschell and the other learned law Lords in the case of *The Greta Holme* (2), and has allowed the plaintiffs demurrage at the rate of 35*l.* a day; that is to say, for the nine days the sum of 315*l.*

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(1) [1897] A. C. 596, at p. 605.

(2) Ibid. 596.

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Prior to the decision of the House of Lords, in the case just referred to, it had been held that damages for detention in such a case as the present could not be recovered; but that decision overruled this view. The case was primarily concerned with that broad question, and in the judgments there is not much to be found indicating any very precise method of ascertaining the damages. The passage above quoted from Lord Herschell's judgment seems to come nearest to doing so.

Now the method contended for by the plaintiffs was expressed by their counsel before the district registrar thus:—He said, according to the printed record: "If the board consider it worth their while to incur all the expenditure which they have to incur for the sake of the benefit which they derive, surely the benefit they derive is valued by the amount of expenditure they incur, and the damage to them through the loss of service is similarly calculated." Further on he argued that one of the ways to get at the value is "to see what the dock board think worth while to spend upon the vessel, because the vessel must be worth to the dock board at least not less than the amount they have thought it worth while to spend on keeping her up, and the measure of what they think worth while to spend on keeping her up is given by the working expenses, including superintendence and general charges of the engineer's department, and in effect depreciation." The same method was contended for by counsel before me. The defendants, on the other hand, maintained that the report allowed sufficient damages, and that nothing more was proved.

The whole difficulty in this case arises from the practical impossibility of proving what is the actual loss sustained by the plaintiffs in such circumstances as those in question. No evidence was forthcoming of the exact monetary effect upon the plaintiffs' position of the work being done by dredging, or of any definite loss caused by the delay; indeed, such evidence would naturally be very difficult to give with certainty, and the engineer to the dock board, the principal witness for the plaintiffs, appears to have admitted that he could not point to any definite injury or inconvenience occasioned by the loss of the services of the vessel. It is, however, clear that the dredging operations must have the effect of improving the navigation, of preventing the channels from silting up, of deepening the channels and thereby permitting vessels to navigate them at times of tide at which they could not otherwise leave or enter, and generally of increasing the facilities and capacities of the port. The plaintiffs' counsel therefore asked the Court to make the assumption that the benefit which is derived by the plaintiffs from these operations must be at least equivalent to the expenditure upon them which the board considered it worth their while to make; in other words, that the benefit was measured by the expenditure which would have produced it, and that the loss of benefit would be measured by that expenditure. The basis for making this assumption was not rested upon any evidence of statistics or calculations of increased dues or other benefits to be derived, or of any materials which the board may have had before them when deciding to incur and continue their expenditure, but was practically rested on argument, and the assumption that it must be so because the board consider it so. It is probably not unreasonable to suppose that the board are not likely, as a matter of business and good sense, to spend more on dredging than will result in producing an equivalent benefit to them, but I shall point out later that this assumption is of a very vague and ambiguous character, and moreover it must not be forgotten that the net or real benefit derived is only the excess of the benefit produced over the expenditure which produced it, and even if the assumption aforesaid be made, it is clear that, if the work should be stopped, while on the one hand the benefit produced by it being done is lost, or perhaps only retarded, on the other hand the expenditure is to a certain extent saved.

I think that counsel for the plaintiffs in their arguments omitted to give full weight to this latter consideration, and also failed to notice the difference between expenditure which does not cease on an accident happening and expenditure which does. To take an illustration, if the dredger had been sunk and totally lost by this collision, it seems to me clear that the plaintiffs could only recover from the wrong-doer the value of the vessel at the time of the loss, whereas the plaintiffs' counsel contended that they could not only recover in such a case the vessel's value, but, in addition, the loss equivalent to the whole of the expenditure which would have been incurred by them from the time of the collision up to the time when they could have replaced her by some other vessel competent to do her work. Upon the assumption aforesaid, the benefit to be derived is to be treated as equivalent to the expenditure, but when a vessel is lost the wrong-doer in paying her value replaces at once the capital which then remains invested in the vessel, and all expenditure, from that moment, ceases, so that while on the one hand the benefit of continued working is lost, any further expenditure equivalent to the benefit is entirely saved. Here it may be asked why should damages for delay be charged on a greater value than the value which would be considered in case of total loss? Again, if a vessel or other property of a certain value is used for business purposes the cost of gaining any benefit by its use is measured by the outgoing current expenditure, together with depreciation upon the property and interest upon the value of the property, and if the only benefit to be produced by working the property is to be equivalent to the expenditure then it is obvious that by a cessation of the work the current expenditure would stop—except so far as is necessary to keep the property in safety—while on the other hand the depreciation—except so far as affected by the vessel or property being laid up—and the interest on capital continue to run on; so that, in my opinion, in a case like the present the out-of-pocket expenses which the owner is compelled to incur, notwithstanding the stoppage, and the depreciation and loss of interest on capital, measure his loss by the delay, assuming of course that the benefit derived by working is only to be treated as equivalent to the expenditure. Applying this reasoning to the present case and for the moment making the main assumption asked for by the plaintiffs, it follows that by the delay in question they lost the actual cost for insurance, wages, general charges, &c., properly chargeable against the dredger, during the delay, and the depreciation and loss of interest on capital for that time. The registrar has given them an allowance for these, and the only question really seems to be whether it is enough. No evidence was given before him, as I understand, as to the actual out-of-pocket cost, but he has taken certain figures from a table of averages given by the plaintiffs and has probably exceeded the real cost. He has apparently based his allowance for depreciation and interest on the value of the vessel at the time of the delay, and I think the only really serious question in the case is whether he has allowed sufficient under these last two heads. This turns upon whether the vessel's value at the time of the loss ought to be regarded as her value based upon the original amount of capital invested in her, and here comes in a difficulty arising from the vagueness and ambiguity of the assumption which the plaintiffs ask the Court to make. The plaintiffs start by asking the Court to make the assumption that the benefit derived in the year 1904 by the working of the dredger is exactly the same as the benefit derived in the first year when the vessel was new, because they contend that, as the dredger, although depreciated in value, is doing as good work now as she was when first built, the benefit they are deriving from her now is to be taken to be equivalent to the benefit which they derived from her when she was first built. They say that the benefit when she was first built, if measured by the expenditure, must be considered having regard to the original value of the vessel, and so taking the actual working expenses as about the same on the average they wish to charge, as expenditure in 1904, the annual average working expenses and also depreciation and interest or owners' profit practically on the original cost of the vessel.

When the whole claim is resting upon hypothesis and assumption, I fail to see why the Court should make any such assumption, especially as all the plaintiffs can really say is that the board think it worth while to make certain expenditure, and it ought logically to follow from that that the inquiry should be what expenditure was the board making in the year 1904. The plaintiffs, however, then say: "At any rate it should be assumed"—though, again, I say there is no evidence to support the assumption—"that the benefit is measured by the actual expenditure from time to time, and then the benefit for the year 1904 should be measured by the expenditure incurred in that year." The plaintiffs, then, to support their claim, are driven to contend that the expenditure for the year 1904 is the same as the expenditure for the first year of her working, and they treat the value of the

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vessel as not diminishing, and base their claim upon some bookkeeping figures. It appears to me that if the expenditure is to be considered as at the time in question, their argument is wholly unsound; because, if the matter is looked at from the ordinary point of view of business accounts, in keeping such accounts when a vessel is being worked for the purpose of producing profits it is usual to charge the profits first with depreciation, and secondly, with interest on the capital before arriving at any net profit. If there is no profit, then the depreciation and loss of interest are clear loss: if the profit is equivalent to them, then there is no net profit, because these losses exhaust the profit obtained. But, assuming that there are profits obtained equivalent to them, when the depreciation and interest are charged against these profits (observe it is only the excess, if any, which should be divided as profits), the sum charged for depreciation and interest is money in hand, which can be utilized in any other business manner, leaving the capital in the vessel merely the depreciated value of the vessel. So in this case the plaintiffs treat themselves as year after year making a benefit out of the working of their dredger equivalent to the expenditure upon her, and if they do so they have to write off each year so much for depreciation and charge the depreciation and interest against the benefit received; so that they must be treated as having that amount in hand, just as an owner of a ship, having charged his profit and loss account with depreciation and interest, has the amount in hand if he has made enough profit to cover the same.

The expenditure, therefore, for the last year of the dredger's working, prior to the accident, would be the out-of-pocket expenses, the depreciation on her then value, and the interest on the capital remaining as representing her depreciated value. In the course of the evidence the vessel's depreciated value appears to have been worked out by figures, showing a result of some 33,300*l.*; but, as she would have become useless and obsolete, according to the evidence, in about five years more, it would seem to me that her real value to the plaintiffs was considerably less, and that upon some fair actual value the registrar must have based the figures for depreciation and loss of interest.

It does not appear to me to be reasonable to ask the Court to act upon the large assumption which the plaintiffs require to be made. It omits to take into account any depreciation of the vessel at all; it omits to take into account the chapter of accidents; it omits to take into account the possibility that a mere trifling delay of a few days will not substantially affect the ultimate operation of the works; and it leaves out of sight that no real evidence was given as to the exact benefit derived from the works, and the time at which that benefit will be received, or of any actual loss; and it seems to me, on the whole, reasonable to consider that where the damages are not really proved, the Court is at liberty to assess them by awarding to the plaintiffs sufficient to compensate them for their actual out-of-pocket expenses, depreciation upon the vessel, and loss of interest upon the capital. The very wide claim made by the plaintiffs, as shown in their statement of working expenses, gives the benefit derived by them for owners' profit of 25 per cent. on the original value of the ship, though if they are obtaining from their work a benefit equivalent to expenditure, ordinary depreciation and interest on capital if charged annually would replace the capital and interest, and if this claim which they make were to be considered as a fair measure, they would be in a position to supply themselves with a new dredger practically every few years out of profits.

With regard to the evidence about other dredgers, that is of very little use in the present case, as it does not appear to have been suggested that the board ever really contemplated hiring a dredger in place of the *G. B. Crow*.

I do not think that the point decided in the case of *The Harrington* (1), and the similar point in *The Greta Holme* (2) in the Court of Appeal, have any real bearing upon the present question, and in reading the judgments in those cases it is not at all clear to me whether the effect of annually charging interest and depreciation against profits was fully considered. I may also observe that in the passage above quoted from Lord Herschell's judgment, where he refers to interest on the money

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(1) 13 P. D. 48 (more fully in 6 Asp. M. L. C. 282).

(2) [1896] P. 192.

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spent in the purchase of the dredger, I do not believe he had present to his mind any question of depreciation, otherwise he would have noticed that the money remaining invested in the dredger is arrived at by the depreciation being written off out of the profits of previous years.

I am not quite clear how the figure allowed for depreciation by the district registrar has been arrived at, but I take it that he has based it on the value to the plaintiffs of the vessel at the time of the delay, which, I am informed, is in accordance with the practice in the principal registry, and it may be open to question whether for the very short delay there was any substantial deterioration, as the vessel was laid up. The depreciation is theoretical rather than real. He appears to have given more than the actual figures would probably shew for out-of-pocket expenses. The item for insurance is taken from the plaintiffs' tables, where the rate would seem to be given as if she were insured on the original value of the dredger, instead of on her value at the time of the accident. The item for wages is also taken from the same tables, and is the average cost of the wages when the vessel is at work, and is evidently not the actual wages paid while she was laid up, and while she was laid up the men appear to have been employed on other useful work, so that their labour was not lost. The item for supplies is stated to be largely in excess of what the merchants considered would have been expended in supplies to a vessel in dock, but a liberal allowance has been made to cover superintendence and sundries. I notice, however, that a charge for superintendence and other general charges had been made and allowed in an undisputed item of the claim (No. 8). It may perhaps be said that depreciation ought to be calculated on the original cost, as the plaintiffs by their tables appear to spread the total depreciation from the original value to nil over the estimated life of the dredger, but in my opinion this is unsound in principle. The plaintiffs, for their book-keeping purposes, spread the depreciation equally over the whole period. but this does not affect the question of what real depreciation is caused by the defendants to a vessel of the value which the vessel had at the time of the disaster, when once that value has been arrived at. Even if this point were conceded

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it would only add 5*l*. or 6*l*. a day to the amount allowed, but if the amounts allowed for insurance, wages and supplies should be reduced by more than this addition, which I think on the evidence ought in all probability to be the case, then this point is unimportant.

I do not feel satisfied that the plaintiffs have made out any case for a larger allowance than that which the district registrar has made to them. Looking at this case broadly, the plaintiffs, without any evidence of distinct money loss, are seeking to recover for the loss of the use of the dredger at a rate which, leaving entirely out of consideration the insurance and other actual out-of-pocket expenses, would amount, in one year, to nearly, if not quite, the value of their dredger; and unless the Court is to embark upon a sea of assumptions and possibilities I conceive that, applying the principles in the case of *The Greta Holme* (1), a business and reasonable view to take is that when the plaintiffs content themselves with such evidence as they gave in the present case, this tribunal, in assessing their damages, may say, as a jury would do, "We must act with some reasonable certainty, and you, the plaintiffs, are reasonably compensated by being awarded a sum which we are fairly satisfied you may have lost, but we cannot follow you into mere speculation." The motion must be dismissed, with costs.

Solicitor for appellants (plaintiffs): *W. C. Thorne, Liverpool.*

Solicitors for respondents (defendants): *Hill, Dickinson & Co., Liverpool.*

T. L. M.

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(1) [1897] A. C. 596.

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Dec. 4, 5, 21.

THE HOPPER No. 66.

Admiralty—Collision—Limitation of Liability—Charterer by Demise—"Owners"—Merchant Shipping Act, 1894 (57 & 58 *Vict. c.* 60), *ss.* 503, 504.

Charterers by demise are not "owners" within the meaning of s. 503 of the Merchant Shipping Act, 1894, and, therefore, cannot claim the benefit of limitation of liability in respect of loss or damage caused by the improper navigation of the ship by their servants.

Action of limitation of liability.

The plaintiffs were Sir John Jackson, Limited, a limited liability company, incorporated under the Companies Acts, and having its head office at Westminster. The defendants were William Ernest Rowland, the owner of the steamship *Blanche*, and her master and crew, suing for the loss of their clothes and effects, and owners of cargo lately laden on board the *Blanche*, and all and every person or persons whomsoever claiming, or being entitled to claim, in respect of damage or loss to the *Blanche*, or to any goods or merchandise or other things whatsoever on board the said steamship *Blanche*.

The case raised the question whether charterers by demise of a ship which is to blame for a collision, caused by the negligence of their servants, are entitled to claim the benefit of limited liability under ss. 503, 504 of the Merchant Shipping Act, 1894. (1)

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(1) 57 & 58 Vict. c. 60.

Sect. 503 (1.): "The owners of a ship, British or foreign, shall not, where all or any of the following occurrences take place without their actual fault or privity; that is to say . . . .

(*c*) where any loss of life or personal injury is caused to any person carried in any other vessel by reason of the improper navigation of the ship;

(*d*) where any loss or damage is caused to any other vessel, or to any goods, merchandise, or other things whatsoever on board any other vessel, by reason of the improper navigation of the ship;

be liable to damages beyond the following amounts, that is to say—

(i.) in respect of loss of life or personal injury, either alone or together with loss of or damage to vessels, goods, merchandise, or other things, an aggregate amount not exceeding fifteen pounds for each ton of their ship's tonnage; and

(ii.) in respect of loss of, or damage to, vessels, goods, merchandise, On June 9, 1903, by an agreement made between the plaintiff company, as charterers, and the London and Tilbury Lighterage Contracting and Dredging Company, Limited, as owners of the steam *Hopper No.* 66, the owners let, and the charterers hired, the hopper, for a minimum period of eighteen months, under conditions which are set out, so far as material, in the judgment, and which, it was admitted by the defendants, amounted to a demise of the hopper.

The plaintiff company was engaged in carrying out certain works for the Mersey Docks and Harbour Board, and on November 30, 1904, whilst the *Hopper No.* 66 was proceeding from the Langton Dock, Liverpool, to sea with a load of clay excavations, she came into collision, in Liverpool Bay, with the coasting steamer *Blanche*, from Fleetwood to Liverpool, with a cargo of gravel. In consequence of the collision the *Blanche* sank, and together with her cargo was lost, whilst of her crew of nine hands, two were drowned and five died from exposure. The *Hopper No.* 66 was badly damaged, but was brought into the Mersey and beached.

On December 1, 1904, a writ was issued on behalf of the owner of the *Blanche*, and her master and crew, against the owners of the *Hopper No.* 66, and a cross writ was issued by the owners of the hopper against the owner of the *Blanche;* but, on ascertaining that the hopper was demised by charter, an order was, on

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or other things, whether there be in addition loss of life or personal injury or not, an aggregate amount not exceeding eight pounds for each ton of their ship's tonnage." . . . .

Sect. 504: "Where any liability is alleged to have been incurred by the owner of a British or foreign ship in respect of loss of life, personal injury, or loss of or damage to vessels or goods, and several claims are made or apprehended in respect of that liability, then the owner may apply in England . . . . to the High Court . . . . and that Court may determine the amount of the owner's liability and may distribute that amount rateably among the several claimants, and may stay any proceedings pending in any other Court in relation to the same matter, and may proceed in such manner and subject to such regulations as to making persons interested parties to the proceedings, and as to the exclusion of any claimants who do not come in within a certain time, and as to requiring security from the owner, and as to payment of any costs, as the Court thinks just."

January 30, 1905, made by consent amending the writs, and substituting for the owner of the hopper, the plaintiff company (Sir John Jackson, Limited), who, as defendants, appeared and counterclaimed for damages for injuries sustained by the hopper in consequence of the collision. On July 24, judgment was delivered in the consolidated action, and a decree made pronouncing the *Hopper No.* 66 alone to blame, and referring the damages to the registrar and merchants to report the amount thereof.

On August 4 actions were commenced in the King's Bench Division of the High Court against the plaintiff company (Sir John Jackson, Limited), claiming damages for personal injuries and loss of life arising out of the collision. These actions were consolidated and set down for trial at the Liverpool Assizes. (1)

On November 17 the plaintiff company (Sir John Jackson, Limited) issued the writ in the present action, and by their statement of claim alleged that they "were before and at the time of the collision . . . . the owners of the steam *Hopper No.* 66," and, alternatively, that by the agreement of June 9, 1903, made between the London and Tilbury Lighterage Contracting and Dredging Company, Limited, as owners of the *Hopper No.* 66, and the plaintiffs, the *Hopper No.* 66 was demised to the plaintiffs for a minimum period of eighteen months, and "the plaintiffs, by the terms of the said agreement, which was in force at the time of the said collision, had the sole possession, control, and management of the hopper and were the temporary owners thereof, and owners within the meaning of the Merchant Shipping Act, 1894, ss. 503, 504."

The plaintiffs then averred that "the collision was caused by the negligent navigation of the *Hopper No.* 66 by the plaintiffs' servants, but without the actual fault or privity of the plaintiffs"; that the gross tonnage of the hopper was 413·82 tons; that the claims arising out of the loss of the *Blanche* would exceed the aggregate amount of 8*l*. per ton on the gross tonnage of the hopper; that they were willing to pay into Court the sum of 3310*l*. 11*s*. 2*d*., being 8*l*. per ton on the gross tonnage, together with interest, and to give bail for such further sum as the Court should direct, not exceeding 2896*l*. 14*s*. 10*d*., being the aggregate amount of 7*l*. per ton on the gross tonnage. The plaintiffs then claimed the usual declaration that they were not answerable in damages in respect of loss of life or personal injury beyond 15*l*. per ton, or in respect of damage to property beyond 8*l*. per ton, and that, on payment into Court of 3310*l*. 11*s*. 2*d*. with interest, and giving security in respect of a sum not exceeding 2896*l*. 14*s*. 10*d*. with interest, they were entitled to relief under the Merchant Shipping Act, 1894, and the Judicature Acts.

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(1) On December 2 judgment was entered by consent in these consolidated actions for sums amounting in the aggregate to 2600*l*. with costs.

On November 23 the defendants put in their defence, the main paragraph of which was that "the plaintiffs were not at any time material the owners of *Hopper No.* 66 as alleged in the statement of claim or at all."

Dec. 4, 5. *Pickford, K.C.*, and *Dawson Miller*, for the plaintiffs, Sir John Jackson, Limited. The agreement, dated June 9, 1903, was in force at the time of the collision, and the *Hopper No.* 66 was being worked under it, the sole possession, control, and management being in the plaintiff company, who kept her in repair and insured her. The master and crew were, with the exception of the engineer, appointed by the plaintiff company, and the master and crew, including the engineer, were paid by and were the servants of the plaintiff company. It is submitted, therefore, that the plaintiffs, as charterers by demise, are to be deemed "owners" of the *Hopper No.* 66 for the purpose of obtaining relief by way of limitation of liability under ss. 503, 504 of the Merchant Shipping Act, 1894.

There is no definition of "owner" in the Act applying to these sections; but, under the Merchant Shipping Act, 1854, Dr. Lushington held "that the word 'owners' here is not confined to registered owners, but applies to what is called equitable owners, that is, owners who are not registered": *The Spirit of the Ocean* (1), and, although there is no case directly in point, other decisions favour the view that where the actual owner has parted with the whole possession and control of the ship to the charterer the latter is pro hac vice owner: see per Dr. Lushington in *The*

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(1) (1865) Br. & L. 336.

Ticonderoga. (1) This dictum was before the consolidation of the Courts by the Judicature Acts, and seems to imply that, though by the maritime law there was a right of proceeding in rem against the vessel doing the damage which could not be taken away by any voluntary contract of the owners with a third party, there was, nevertheless, at common law a liability as "owner" incurred by the charterer under his contract. In *The Lemington* (2), Sir R. Phillimore sets out this portion of the judgment of Dr. Lushington, and also the passage in the judgment of the same learned judge in *The Druid* (3): "The liability of the ship and the responsibility of the owners . . . . are convertible terms; the ship is not liable if the owners are not responsible, and vice versa, no responsibility can attach upon the owners if the ship is exempt and not liable to be proceeded against"; and then makes the following observation: "The true interpretation of the general proposition of law, there laid down, depends very much upon the sense in which the word 'owners' is used. A vessel placed by its real owners wholly in the control of charterers or hirers, and employed by the latter for the lawful purposes of the hiring, is held by the charterers as pro hac vice owners. Damage wrongfully done by the res whilst in possession of the charterers is, therefore, damage done by 'owners' or their servants, although those owners may be only temporary."

The position of the parties in this case is very much the same as in *Baumwoll Manufactur von Carl Scheibler* v. *Furness* (4), where it was held that a person who is registered as the owner of a ship, and also registered as the managing owner, is not liable to shippers, under bills of lading signed by the master or ship's agent, for loss of cargo alleged to have arisen from the unseaworthiness of the ship, if he has divested himself by the charterparty of all control and possession of the vessel for the time being in favour of the charterers, who have all the use and benefit thereof, even if the shippers have no notice of the contents of the charterparty.

[They were stopped by the Court.]

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(1) (1857) Swa. 215, at p. 217. The passage referred to is set out in the judgment below.

(2) (1874) 2 Asp. M. L. C. 475, at p. 478.

(3) (1842) 1 W. Rob. 391, at p. 399.

(4) [1893] A. C. 8.

A. D. Bateson and *L. F. C. Darby*, for the defendants, the owner of the *Blanche*, and others. No case has been cited on behalf of the plaintiffs which establishes the proposition that charterers by demise are "owners" for the purpose of claiming the benefit of limitation of liability under ss. 503, 504 of the Merchant Shipping Act, 1894.

By the common law, and the ancient general maritime law, the measure of the liability of the wrong-doer is the full extent of the injury sustained through negligence: see Pritchard's Admiralty Digest (1); and any statutory abridgment of that liability is to be construed strictly: Maxwell on the Interpretation of Statutes. (2) Limitation of liability is a creature of statute law, and is a privilege which operates severely upon the sufferer. The person claiming it must, therefore, bring himself within the plain meaning of the provisions of the statute: see per Sir R. Phillimore in *The Andalusian*. (3) Originally limitation in this country arose out of a petition presented to the House of Commons by owners of ships, and the preamble to the first statute passed in consequence of that petition in 1734 (4) is entitled "An Act to settle how far owners of ships shall be answerable for the acts of the masters or mariners," and refers to the foundation of the limitation, viz., that "it is of the greatest consequence and importance to this kingdom to promote the increase of the number of ships and vessels," that "it has been held, that in many cases owners of ships or vessels are answerable for goods and merchandise shipped or put on board the same, although the said goods and merchandise, after the same have been so put on board, should be made away with by the master or mariners of the said ships or vessels, without the knowledge or privity of the owner or owners, by means whereof merchants and others are greatly discouraged from adventuring their fortunes as owners of ships or vessels, which will necessarily tend to the prejudice of the trade and navigation of this kingdom." The protection of "owners" is, therefore, the keynote of the subsequent legislation on this subject. (1) Charterers are not persons contemplated by these statutes, and if they were deemed to be included, then, as foreigners charter British ships, foreigners might become pro hac vice owners, which is contrary to law. Again, if charterers were included, s. 12 of the Regulation of Railways Act, 1871 (2), would be unnecessary, but by that section the benefit of limitation of liability is extended to railway companies who, under contracts for carrying persons, animals, or goods by sea, procure them to be carried in vessels which do not belong to the company. This is a case of tort, and *Baumwoll Manufactur von Carl Scheibler* v. *Furness* (3) has no bearing on it, as there the point on which the case turned was that the shipper of the goods lost had no contract with the owner of the ship. The case of *The Lemington* (4) is dealt with in *The Ripon City* (5), and is there used as an illustration of the proposition that "third persons whose property is damaged by negligence in the navigation of a vessel by those in charge of her should not be deprived of the security of the vessel by arrangement between the persons interested in her and those in possession of her". . . . "persons interested in a vessel in placing her in the possession and control of other persons, to be used or employed in the ordinary way, must contemplate that claims may arise against her in respect of rights given by the maritime law, and may be taken to have authorized those persons to subject the vessel to those claims." In other words, in such cases the real owner may be liable through the res for damage by collision whilst in the hands of third persons, and in an action in rem the actual owner could claim to limit his liability: see *Quinlan* v. *Pew*. (6) The only decision in *The Spirit of the Ocean* (7) was, in the words of Mr. Marsden (8), that "beneficial owners, as well as registered owners, are entitled to the benefit of limited liability," and the learned author immediately adds: "It would probably be held that charterers and other persons having a temporary ownership of the vessel are not entitled to the benefit of the Act."

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(1) (1887) 3rd ed. p. 1336, notes 452, 453.

(2) (1905) 4th ed. p. 427.

(3) (1878) 3 P. D. 182.

(4) 7 Geo. 2, c. 15.

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(1) (1786) 26 Geo. 3, c. 86; (1813) 53 Geo. 3, c. 159; M. S. Acts, 1854, 1862, 1894, 1898, 1900.

(2) 34 & 35 Vict. c. 78.

(3) [1893] A. C. 8.

(4) 2 Asp. M. L. C. 475.

(5) [1897] P. 226, at pp. 234, 236, 237, 243, 245.

(6) (1893) 56 Fed. Rep. 111.

(7) Br. & L. 336.

(8) Collisions at Sea, 5th ed. p. 156.

[*Pickford, K.C.* The same learned author says, at p. 162, "Whether charterers and others in the position of pro hac vice owners are within the benefit of the Act seems doubtful."]

In the present case the position of the charterers towards the owners was determined by contract, but "all rights which arise from contracts . . . . are rights to acts or forbearances on the part of determinate persons, and to nothing more": Austin's Lectures on Jurisprudence. (1) The same view is taken by Mr. Holland (2), and the rights of the charterers will not fall under the description of ownership, involving the jus utendi, fruendi, et abutendi, given in Sweet's Dictionary of English Law, or in Markby's Elements of Law. (3) The plaintiffs' rights were rights of user only—they could not mortgage the vessel, nor could they sell it; in other words, they were not "owners."

Pickford, K.C., in reply. Assuming that at the outset the object of limitation of liability was to encourage British shipping, and that the owner of a foreign ship could not avail himself of this privilege: *Cope* v. *Doherty* (4); it can hardly be said that that was the object in view when by the Merchant Shipping Act Amendment Act, 1862 (5), protection was extended to foreign owners, and it may be inferred from the course of subsequent legislation—as in the case of the Merchant Shipping Act, 1898 (6), extending the protection to unregistered ships for three months from launching, and the Merchant Shipping Act, 1900 (7), extending the protection to persons who cannot be called owners of ships, viz., owners of docks and canals and harbour and conservancy authorities—that the object of these statutory provisions is to protect persons who, like the plaintiffs in the present case, are not actually in fault themselves, but who are in law responsible for the acts or defaults of their servants. This was the first ground of the decision in the early case of

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(1) (1879) 4th ed. p. 386.

(2) Elements of Jurisprudence (1900), 9th ed. ch. xii., Rights in personam.

(3) (1889) 4th ed. s. 315.

(4) (1858) 2 De G. & J. 614.

(5) 25 & 26 Vict. c. 63.

(6) 61 & 62 Vict. c. 14.

(7) 63 & 64 Vict. c. 32.

Wilson v. *Dickson* (1), where, in an action against several defendants as shipowners, it was held that, under 53 Geo. 3, c. 159, s. 1, they were not liable in that character beyond the value of the ship and freight, although the loss was occasioned by the misconduct of one of the defendants who was both master and part owner; and in *Colvin* v. *Newberry* (2) a charterer by demise was held by the House of Lords to be owner pro tempore of the ship. In *The Ripon City* (3), a passage in the judgment of Lord Hannen in *The Tasmania* (4) is quoted, in which charterers are referred to as "pro hac vice owners."

With regard to the suggestion that a foreigner might become pro hac vice owner of a British ship, it may be that under the provisions of the Merchant Shipping Act, 1894, a British ship may not be chartered by way of demise to a foreigner; but that question does not arise in the present case.

Cur. adv. vult.

Dec. 21. BARGRAVE DEANE J. [After reviewing the facts already set out, the learned judge continued:—] In the present action Sir John Jackson, Limited, claim, as "owners" of the steam *Hopper No.* 66, to be entitled to a declaration of the Court limiting their liability under s. 503 of the Merchant Shipping Act, 1894, to 8*l.* per ton under sub-s. 1 (ii.), and to 15*l.* per ton under sub-s. 1 (i.), and offer to pay into Court the sum of 3310*l.* 11*s.* 2*d.*—being the limitation of 8*l.* per ton on 413·82 tons—and to give bail for a further sum of 2896*l.* 14*s.* 10*d.*—being the further sum of 7*l.* per ton—making 15*l.* per ton in the aggregate. Alternatively, Sir John Jackson, Limited, allege that "by an agreement dated June 9, 1903, made between the London and Tilbury Lighterage Contracting and Dredging Company, Limited, as owners of the steam *Hopper No.* 66, and the plaintiffs, the said steam *Hopper No.* 66 was demised to the plaintiffs for a minimum term of eighteen months from the said date, and the plaintiffs by the terms of the said agreement, which was in force at the time of the said collision, had the sole possession, control, and management of the said hopper and were the temporary owners thereof, and owners within the meaning of ss. 503 and 504 of the Merchant Shipping Act, 1894." The defendants by way of defence did not admit the agreement, and denied that the plaintiffs were owners of the steam *Hopper No.* 66 at the time of the collision so as to be entitled to a declaration of limitation of liability.

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(1) (1818) 2 B. & Ald. 2.

(2) (1832) 1 Cl. & F. 283.

(3) [1897] P. 226, at p. 237.

(4) (1888) 13 P. D. 110, at p. 118. The passage is set out in the judgment below.

The case came before me and was argued on December 4 and 5, 1905. The agreement of demise was proved. In it the London and Tilbury Lighterage Contracting and Dredging Company, Limited, are throughout described as owners, and Sir John Jackson, Limited, as charterers. The term was eighteen months as a minimum, with power to the charterers to extend the hire by giving three months' notice before the end of the eighteen months; the owners to have the right of terminating the hire at the end of two years by giving to the charterers three months' notice prior to the end of the said two years. Paragraph 8 provided that "the captain and crew to be appointed and paid by charterers, with the exception of the engineer, who is to be appointed by the owners but shall be paid by and at charterers' usual rate . . . . and he shall be deemed to be the servant of the charterers." Paragraph 9 provided that the charterers should during the period of hire keep and maintain the hopper and her machinery, &c., in good working order, with provision as to times and nature of this repairing. Paragraph 14 provided that the charterers should insure and keep insured the said hopper, and deposit such policy with the owners, and that they would indemnify the owners against all claims, losses, or liabilities of whatsoever nature or kind in consequence of any collision, accident, casualty, or otherwise, which might happen to or be caused by the said hopper or to or by the men employed in connection therewith. Paragraph 18 provided in case of default made by the charterers in any of the conditions in the agreement being performed by them that the owners might put an end to the agreement and retake possession of the hopper and enforce the payment by the charterers of all sums due under the agreement.

It was under this agreement that, at the date of the collision, Sir John Jackson, Limited, were employing the steam *Hopper*

No. 66, and that she was manned by a crew who were the servants of Sir John Jackson, Limited.

The short question is, did that possession under the agreement of demise dated June 9, 1903, constitute Sir John Jackson, Limited, the owners of the steam hopper within the meaning of the Merchant Shipping Act, 1894, ss. 503 and 504. It is agreed that there is no case reported where this particular point has been decided; but on behalf of Sir John Jackson, Limited, it was argued that a limited ownership, or ownership pro hac vice would entitle them to the relief given by the sections in question. The name of the London and Tilbury Lighterage Contracting and Dredging Company, Limited, appears on the register as the registered owner of the steam *Hopper No.* 66, and there is no mention in this register of Sir John Jackson, Limited. It is to be noticed that the collision action was an action in personam for negligence, and not an action in rem—the negligence being that of Sir John Jackson, Limited, by their servants—and there is now no question that the whole of the damage did, in fact, ensue from that negligence. It would follow that the wrong-doer would have to make full compensation for the damage so done. Can it be said in this case that the Court has power to reduce or limit the amount of that compensation?

In the course of the argument, various cases have been cited, and I am asked to say that I may treat them as affording me a guide to the conclusion that the word "owners" in those sections of the Merchant Shipping Act may be construed to mean owners pro hac vice. The case of *The Spirit of the Ocean* (1) does not touch the question in my opinion. It was a question of co-ownership, and not of charter. *The Lemington* (2) was an action in rem, and it was held that even if the res be chartered by her owners to charterers so that the whole control and management of ship and crew are vested in the charterers, still the res is liable, and thereby the owners as apart from the charterers. Sir R. Phillimore in that case quotes the words of Dr. Lushington in *The Ticonderoga* (3) as follows: "Supposing a vessel is chartered so that the owners have divested themselves, for a pecuniary consideration, of all power, right, and authority over the vessel for a given time, and have left to the charterers the appointment of the master and crew, and suppose in that case the vessel had done damage, and was proceeded against in this Court—I will admit, for the purpose of argument, that the charterers, and not the owners, would be responsible elsewhere, although I give no opinion upon that point—but still I should here say to the parties who had received the damage, that they had, by the maritime law of nations, a remedy against the ship itself." These words suggest fairly plainly that in the mind of the learned judge you can reach the owners through the res, but also the charterers in personam.

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(1) Br. & L. 336.

(2) 2 Asp. M. L. C. 475.

(3) Swa. 215, at p. 217.

In the case of *Baumwoll Manufactur von Karl Scheibler* v. *Furness* (1) there is a passage in the judgment of the Lord Chancellor which is relied on. The facts of the case were shortly as follows:—A., the owner, let his ship to B. for a term for a lump sum, to be paid month by month. The use which was to be made of the vessel was during that term vested entirely in the charterer—the owner had no voice whatever in it. The master and crew were appointed and paid by the charterer. All that A. had a voice in was the nomination of the chief engineer, and even that officer was to be paid by the charterer—and there was a clause indemnifying the owner against liability. Thus far the case is on all fours with the facts in the present case. The charterers by their captain and agents shipped a cargo of cotton at New Orleans, and the ship foundered at sea on her voyage from New Orleans, and the cargo was lost owing, as was alleged, to unseaworthiness. The shippers brought an action against both the charterers and the owner of the ship for breach of duty and contract. It was an action in personam and not in rem, and the question was whether the owner was liable or the charterer, or both. The passage in the judgment is on p. 17: "There may be two persons at the same time in different senses not improperly spoken of as the owner of a ship. The person who has the absolute right to the ship, who is the registered owner, the owner—to borrow an expression from real property law—in fee simple, may be properly spoken of, no doubt, as the owner; but at the same time he may have so dealt with the vessel as to have given all the rights of ownership for a limited time to some other person, who, during that time, may equally properly be spoken of as the owner. When there is such a person, and that person appoints the master, officers, and crew of the ship, pays them, employs them, and gives them the orders, and deals with the vessel in the adventure, during that time all those rights which are spoken of as resting upon the owner of the vessel rest upon that person who is, for those purposes during that time, in point of law to be regarded as the owner." These words are used in considering the question, which arose in that case, whether the relationship of shipper and shipowner existed which was requisite in order to establish the liability of A. or B., and in the result the judgment pronounced in favour of A. as not liable, but against B. This decision, however, in no way supports the suggestion that the charterer is owner within the meaning of ss. 503 and 504 of the Merchant Shipping Act, where there is in contemplation the liability of the registered owner for damage caused by the res, and the action is one in rem, and the cause of action is tort and not breach of contract.

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(1) [1893] A. C. 8.

In *The Tasmania* (1) Lord Hannen dealt with the case of a chartered tug which came into collision with another vessel. He held that an action in rem would not lie against the tug because the owners, as opposed to the charterers, were not personally liable for the collision, and the charterers had exempted themselves from liability by the terms of their towing contract. Lord Hannen's words are valuable. He said: "The result of the authorities cited appears to me to be this, that the maritime lien resulting from collision is not absolute. It is a prima facie liability of the ship, which may be rebutted by shewing that the injury was done by the act of some one navigating the ship not deriving his authority from the owners, and that, by the maritime law, charterers, in whom the control of the ship has been vested by the owners, are deemed to have derived their authority from the owners, so as to make the ship liable for the negligence of the charterers, who are, pro hac vice, owners. These propositions do not lead to the conclusion that where, as between the charterers and the person injured, the charterers are not liable, the ship remains liable nevertheless."

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(1) 13 P. D. 110, at p. 118.

The plaintiffs relied on the judgment of Gorell Barnes J. in the case of *The Ripon City* (1), but in my opinion the very learned and interesting judgment in that case does not assist the plaintiffs' case. I now turn to the very simple defence put forward, which is as follows:—This is a claim for compensation for a tort, and the full compensation is due to the claimants, unless there is any statutory provision which may reduce it. It is said that the Merchant Shipping Act, 1894, ss. 503 and 504, do. That Act must be construed strictly. The limitation of the liability to make full compensation is expressly reserved to "owners," and you cannot read into the sections words limiting or varying or adding to the word "owners." The owners of the steam *Hopper No.* 66 are and were the London and Tilbury Lighterage Contracting and Dredging Company, Limited. Sir John Jackson, Limited, were the charterers, and the sections do not include charterers within the term owners.

In my opinion the defendants are right in their contention, and Sir John Jackson, Limited, are not and were not owners of the steam *Hopper No.* 66 at the time of the collision of that vessel with the steamship *Blanche*, and it follows that they have no ground for their application in this action for a declaration that their liability should be limited under the provisions of ss. 503 and 504 of the Merchant Shipping Act, 1894. I, therefore, pronounce judgment for the defendants with costs.

Solicitors for plaintiffs: *Hill, Dickinson & Co., Liverpool.*

Solicitors for defendants: *Batesons, Warr & Winshurst, Liverpool.*

T. L. M.

(1) [1897] P. 226.

C. A.
1905
Dec. 14, 15, 16.

[IN THE COURT OF APPEAL.]

THE BEARN.

Admiralty—Ship—Damage—Defective Berth—Duty of Harbour Authority—Duty of Wharf Owner.

In an action by the owners of a steamship against trustees, in whom a harbour was vested by statute with the usual rights as to tolls, and duties as to maintenance, and against a railway company, owners of a wharf, to recover the amount of damage sustained by their vessel by reason of the defective condition of a berth alongside the wharf in the harbour, the defence on the part of the trustees substantially was that as they had not received any report from the local pilots, upon whom the duty was imposed by their by-laws of making periodical inspections and taking soundings, they had not been negligent in being unaware of the defective condition of the berth. Secondly, that the defect was due to the wrongful act of those in charge of a steamer throwing the stokehold refuse overboard immediately prior to the arrival of the plaintiffs' vessel, and, therefore, it was not reasonably possible for the trustees to be aware of the defect, as periodical inspections would not have detected it. The defence on the part of the railway company was that as the responsibility of keeping the berth in proper condition rested with the trustees, who they knew employed the pilots to take the necessary soundings, they were not negligent in being unaware of a defect due to a breach of the harbour by-laws by persons unknown:—

Held, by the Court of Appeal, affirming the decision of the Court below, that both defendants were liable—the trustees because they had negligently omitted to perform the duty laid down in *Mersey Docks Trustees* v. *Gibbs*, (1866) L. R. 1 H. L. 93, of taking reasonable care to see whether the harbour, including the berth in question, was in a fit condition, and they could not shift this duty on to the local pilots who were not their servants, and whose duty to sound was for the purpose of enabling them efficiently to navigate the vessels employing them. Secondly, assuming, without evidence, that the defect had been caused so shortly before the plaintiffs' vessel came in that periodical examinations would not have detected it, this defence was not open to them, because they had not performed their duty of examination of the berth by their servants, and, therefore, could not be heard to say that if they had done their duty the defect would not have been detected. The railway company was liable under the rule in *The Moorcock*, (1889) 14 P. D. 64, because as owners of the wharf they had invited the plaintiffs' vessel alongside for profit to themselves, and could not rely upon the pilots performing the duty cast upon them by the trustees, for, in their capacity as wharf owners, the railway company had the opportunity of ascertaining the condition of the berth, and should, therefore, have either satisfied themselves that it was reasonably fit, or warned those in charge of the vessel that they had not done so.

APPEAL by defendants, the Shoreham Harbour Trustees and the London, Brighton and South Coast Railway Company from a decision of Bargrave Deane J., holding them liable for the damage sustained by the steamship *Bearn* belonging to the plaintiffs, the Compagnie Maritime de la Seine.

The case raised the question as to the liabilities of harbour authorities and wharf owners towards a shipowner, whose vessel is injured by reason of a defective berth in a harbour vested in the harbour authority, and alongside a wharf vested in the wharf owner.

The defendants, the Shoreham Harbour Trustees, are the duly constituted port and harbour authority for the port of New Shoreham, under the provisions of the New Shoreham Act, 1816 (56 Geo. 3, c. lxxxi.), as amended and varied by the New Shoreham Harbour Act, 1873 (36 & 37 Vict. c. ccxi.), the New Shoreham Harbour Act, 1876 (39 & 40 Vict. c. ccxi.), and the New Shoreham Harbour Act, 1887 (50 & 51 Vict. c. xcv.). Under these statutes the trustees have power to levy, and do levy, tolls in respect of all vessels entering and using the harbour, and tolls on a higher scale in respect of all vessels loading or unloading within the limits of the harbour.

The defendants, the railway company, own Kingston Wharf, and under the London, Brighton and South Coast Railway Company (Rates and Charges) Order Confirmation Act, 1891 (54 & 55 Vict. c. ccxvii.), have power to charge, and do charge, the owners of merchandize a reasonable sum for goods loaded, or unloaded, or warehoused at the wharf. The berth alongside Kingston Wharf is part of Shoreham Harbour, and as such is vested in the defendants, the Shoreham Harbour trustees.

About 1 P.M. on October 22, 1903, the *Bearn*—from Paris and Rouen to London via Shoreham, laden with flour, sugar, and general cargo—entered, at about high water, the harbour of New Shoreham, and under instructions by postcard addressed to the pilots of Shoreham Harbour by the ship's broker, was taken by a Trinity House pilot to a berth alongside Kingston

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Wharf, where she was moored for the purpose of discharging cargo consigned to Rubie & Adams, lessees from the railway company of a warehouse on the wharf; but by reason of the uneven and defective condition of the berth she was badly strained and damaged.

The cause of the defect in the berth was, according to the particulars furnished by the plaintiffs, a "hump or obstruction" consisting "of what was apparently a large collection of coal, ashes, iron, clinkers and other engine-room rubbish." This stokehold refuse, it appeared from the evidence, had been thrown overboard by an excursion steamer, the *Worthing Belle*, which had been lying there off and on for some time previously, and had moved out from the berth to make way for the *Bearn*.

By clause 1 of the by-laws, approved by a judge of the High Court February 1, 1877, and made by the Shoreham Harbour Trustees under the New Shoreham Harbour Act, 1876, with which is incorporated the Harbours, Docks and Piers Clauses Act, 1847, "The master of any vessel entering the harbour or dock shall properly moor the said vessel under the direction of the harbour master or his assistant. . . . ." By clause 7, "Every pilot acting as such to any vessel entering or leaving, or within the harbour or dock shall, from time to time, acquaint himself, and keep himself thoroughly acquainted by soundings and otherwise, with the depth of water in the harbour and dock, and the entrance thereof respectively, the shape and slope of the bed of the channels, and all other matters necessary to qualify himself efficiently to navigate such vessel in and out of the harbour or dock."

By the regulations for keeping watch and taking soundings to be observed by the pilots licensed for the Shoreham district, "the pilots are to take soundings once a week or oftener, if necessary, at the" places mentioned "and also at the wharves," at low water, neap and spring tides, "and the senior pilot is to record the result, with the further particulars required, in the book provided for that purpose which is to be kept at the Watchhouse and to be accessible to the pilots at all times."

The duties of the harbour-master, appointed by the Shoreham Harbour Trustees, included making and keeping himself "acquainted by sounding and otherwise with the condition of the channels and berths."

On January 19, 1904, the plaintiffs, the owners of the *Bearn*, issued a writ against the defendants, the Shoreham Harbour Trustees, and by their statement of claim, delivered on April 16, alleged, inter alia, that the defendants publicly invited vessels to enter, and use and load, and unload within the harbour, and under their statutory powers levied tolls in respect of all vessels entering and using the harbour, and loading or unloading within the limits of the harbour. The plaintiffs then charged the defendants with a breach of their duty as the harbour authority in failing to make or maintain, or to take reasonable care to make or maintain, the berth alongside Kingston Wharf in a safe and proper condition, and the plaintiffs averred that "the defendants knew or had the means of knowing and ought to have known the condition of the berth, and improperly failed to warn those on board the *Bearn* that the berth was in an unfit and dangerous condition," and they further averred that the defendants "negligently failed to ascertain or take proper care to ascertain if the berth was in a safe and proper condition for the *Bearn* to lie there, and negligently failed to inform those on board the *Bearn* that they had not ascertained or taken care to ascertain if the berth was in a safe and proper condition."

By their defence, delivered on April 28, the Shoreham Harbour Trustees, inter alia, denied that they had the control and management of the berth, and denied that there was any duty on them to make and maintain the berth in a safe and proper condition, or that they or their servants were required to ascertain if the berth was in a proper condition, and if unsafe or dangerous to warn the plaintiffs of the fact, and they alleged that "the said berth and adjoining wharf are the property of and maintained by the London, Brighton and South Coast Railway for their own use and profit and for the purposes of loading and discharging vessels, and the plaintiffs' steamship *Bearn* came to the said berth at the invitation and request of the said company for the purpose of discharging her cargo at their wharf. If the bottom of the said berth was not in a fit and safe condition (which is not admitted), the same was due to the negligence of the said company or their servants, for whose acts or negligence the defendants are not responsible."

In view of this defence, the plaintiffs, on May 18, administered interrogatories to the defendants, to which the material answers were as follows: "Some unevenness was found in the berth, consisting of coal, ashes, clinker and stokehole refuse thrown or allowed to fall overboard from a vessel which was lying at the berth when the *Bearn* arrived. The defendants first learnt of this deposit after the *Bearn* had left the berth. The reasons why the defendants did not know of the presence of the said deposit before are the following: (1.) The said wharf and berth are the property of the London, Brighton and South Coast Railway Company, and are under their control and management for their own purposes and profit, and are not under the control, supervision, or management of the defendants or their servants. (2.) There is no duty on the part of the defendants to vessels coming to or lying at the said wharf to provide a safe berth or ascertain its condition, or give warning if the berth is unsafe. (3.) The defendants relied, as they reasonably might, on the proper discharge by the said railway company of their duty to vessels using the said wharf, by the pilots of their duty to vessels employing them to keep themselves thoroughly acquainted, by soundings and otherwise, with the depth of water at and the condition of the berth to which vessels are piloted and moored, and by those on board vessels using the said wharf and berth not to throw or let fall overboard anything likely to make the berth unsafe. (4.) No report was made nor notice given by the said railway company, pilots, or any other person that the said unevenness existed before or whilst the *Bearn* was at the said berth, or that the berth was other than in good condition and safe. And (5.) the *Bearn* shifted into the berth before there was any opportunity for the defendants or their servants or any other person to examine the berth and discover the existence of the deposit left by the vessel which occupied the berth when the *Bearn* arrived, and which lay there without herself sustaining any injury." The defendants further said: "that the said deposit was removed by their dredger and plant at the request of the said railway company, and that the said company or owners of the vessel which made the deposit are liable for the expense of removing it." In answer to another interrogatory, the defendants said that the "berth was last dredged, cleared and levelled by them or their servants on or about August 30, 1902, at the request of the railway company."

In consequence of these answers the plaintiffs proceeded also against the London, Brighton and South Coast Railway Company, and by their statement of claim, delivered on October 18, alleged that they had "suffered damage by reason of the negligence and default" of the railway company, and they made similar charges as in the case of the claim against the Shoreham Harbour Trustees. The railway company delivered their defence on November 5, denying that the alleged damage "was caused by any neglect or default of the defendants or their servants," and, inter alia, stating that "the berth referred to is part of the Shoreham Harbour, and is the property of the other defendants. The said berth is and always has been under the control and management of the said other defendants, who at their own expense have to the knowledge of these defendants from time to time repaired the said berth as and when required, and maintained the same in good order and condition." After denying that they owed any duty or were under any obligation to the plaintiffs in respect of the berth, the defendants further said: "If the said berth was defective as alleged, such defect was solely caused by the wrongful act of some persons on board of some steamship to these defendants at present unknown, who, in breach of the provisions of s. 105 of the New Shoreham Act, 1816, and the harbour regulations, have thrown or emptied into the said harbour $\frac{\text{and}}{\text{or}}$ on to the said berth, engine-room and stokehole refuse. These defendants did not know of and had no reasonable means of knowledge of and no reason to apprehend such wrongful act $\frac{\text{and}}{\text{or}}$ the defect thereby caused, and they will contend that if they were under any duty or obligation to the plaintiffs (which is denied) they are not in the circumstances liable."

This case was tried, with the assistance of two of the Elder Brethren of the Trinity House, on March 23, 24, 28 and 29

1905, and on March 31 the learned judge delivered the following judgment:—

BARGRAVE DEANE J. This is an action for damage brought by the owners of the French steamship *Bearn* originally against the harbour trustees of Shoreham Harbour. The defendants in that action denied their responsibility, and put the blame on the London, Brighton and South Coast Railway Company. Interrogatories were administered to the Shoreham Harbour Trustees and were answered, and then further answers were required and were also given, but, without going into the details of those answers, it is sufficient to say that the general effect of them was, " We are not responsible, the railway company are." Thereupon the owners of the steamer brought another action against the London, Brighton and South Coast Railway Company claiming damages from them for negligence with regard to the berth in which their ship got damaged, and the railway company took the same line as the harbour authorities, like two little boys in the street, "Please, sir, it was not me, it was the other one." And the result is that we have now got two actions, consolidated, by the owners of the steamer against both the harbour authorities and the railway company.

There is no doubt, and there has been no dispute on this point, that the *Bearn* was damaged, and that she was damaged at a particular spot, and I do not think, taking the whole of the course of the evidence, that there is any dispute as to how she became damaged, namely, that there was in this berth what has been described as a hump on which at low tide this vessel rested, with the result that she strained herself. I do not know the amount, but considerable damage was sustained to her bottom. There is no suggestion that any blame attaches to the *Bearn* herself or to those in charge of her.

The Shoreham Harbour authorities are a body created by an Act of Parliament, 56 Geo. 3, c. 81, and this Act has been further enlarged by later statutes, which I need not deal with. By the original Act, which was very much in the same form as other similar Acts of Parliament giving power to harbour authorities, the harbour authorities are put in possession of this harbour. They are the owners of it subject to certain liabilities and duties, and certain privileges are conferred on them by Act of Parliament, which enables them to make charges on all vessels that come into the harbour, and additional charges on those vessels if they either load or unload in the harbour.

The limit of their jurisdiction extends, for the purpose of this case, up to this wharf—up to where the piles enter the ground, the outside edge of this wharf, the Kingston Wharf, or the Old Quay Wharf. It is their duty to see that their harbour is kept free from obstructions. It is their duty—I need not go through all the sections of the Act of Parliament, which I have very carefully looked at since the case was heard—but it is their duty to provide that the channel, which includes this berth, is kept free from obstructions, and there is a further duty imposed upon them by reason of their taking tolls to see that the places where these ships go are proper places fit and safe for those ships.

Now, what do the harbour authorities say with regard to this particular case? They say we have no responsibility at this berth. They say, "We look to the pilots." "We have got a by-law which says that the pilots shall take care that the navigation of this place is kept inspected and sounded, and it is their duty to report to us, and we have nothing more to do with it."

I confess I am in some difficulty about the position of the pilots. The pilots are not the servants of the harbour authorities, they are the servants of the Trinity House, and although there is a by-law which says that these pilots are to take soundings and so on, I am not at all sure that that by-law is one which is of any validity. I do not think that the harbour authorities can put upon the servants of the Trinity House a duty which is put on themselves by Act of Parliament, unless they can shew that the Trinity House pilots are their servants and that they were authorized by them as their servants to take these duties upon them. And there the Elder Brethren agree with me. They say: "These pilots are our servants, and not the servants of the harbour-master or the harbour board, and we protest against their being made the servants of the harbour authorities. They have got their own duties to perform, in which they look to us as their masters, and we object to anyone else having any authority over them."

That, I think, disposes of one part of the harbour authorities' position. They are not entitled to shift on to other persons who are not their servants duties which the Act of Parliament imposes upon themselves.

With regard to the history of this matter, it appears that on some occasions the question of this berth has given rise to dispute between the railway company and the harbour authorities, and correspondence has been put in and also the minutes of the harbour authorities, and without taking the whole of the correspondence on each occasion when this matter arose, there are certain documents on each occasion which shew the position. The railway company own two sorts of berths—they own this berth and two others, which are called outside berths—that is to say, berths in the channel of the river. They have also what are called dock berths, which are inside the line of the wharf, and which are generally dry at low water, and mud and silt accumulates there. The railway company at one time said that those inner dock berths were also subject to the harbour board, but I think eventually it was cleared up in this way, that they both agreed that the inner docks were not subject to the jurisdiction of the harbour authorities, but that the outer berths were. On November 30, 1877, there is a letter from the harbour board to the railway company which finishes one set of difficulties, and that is a letter from Mr. Mayall to Mr. Knight of the railway company: "You will be pleased to learn that the Shoreham Harbour Works Committee, of which I am chairman, have ordered the berths at the Kingston Wharf to be cleared out and kept clean at the expense of the Trust." That concluded the correspondence which I have alluded to between the company and the harbour authorities with regard to the berth at Kingston Wharf in Shoreham Harbour in the year 1877.

Later on, in 1886, there was further correspondence, and there are two letters, one of June 17, 1886, from the clerk to the harbour board, to Mr. Knight: "Dear Sir, re Kingston Dock Berths. Your letter of the 31st ult. was laid before the trustees at their meeting on the 15th inst., when I was directed to inform you that the trustees will keep clear the berths abutting on the river, but they do not feel it to be their duty to remove silt from the inside berths." On June 28, 1886, the wharfinger of the railway company at Kingston writes: "Sir, Dock Berth" (that is the inner berth). "The proposal of Mr. Hardy does not in any way alter the case. The berths referred to are those outside, in front of the wharf situated in the channel or bed of the river, the tide flowing and ebbing drives the silt away and keeps them clear. These berths, or rather the ground outside our wharf, belongs to the trustees, and they have always looked after them. We are not asking the trustees to do anything to these berths but to clear the silt and mud out of the dock berths. The trustees ought certainly to give some further explanation for breaking their agreement which they entered into with us in 1877, and considering that since that date and when the brickmaking business was good they charged a royalty on the sand taken out of the docks. Yours truly, H. Hackett." The end was this, that there was an agreement that the harbour authorities would clear those dock berths, the inner berths, at a price of sixpence a ton, and so the matter stood, but the harbour authorities repudiated any duty with regard to the inner berths. They agreed to clear them if necessary, at sixpence a ton, while they agreed to keep clear, without cost to the railway company, the outer berths.

The next matter was in 1900, when Mr. Hackett, the wharfinger, wrote to Mr. Catt, the harbour-master, as follows: "November 7, 1900, Old Quay Berth," that is, this very berth. "Dear Sir,—I beg to inform you that I have repeatedly cautioned your men in charge of loaded hoppers not to put them alongside of this berth. It now appears that a hopper with faulty doors has been left at this berth and a quantity of beach has dropped out, and the pilots now inform me that it is in a very bad state and refuse to put a large steamer, expected every tide, at this berth. This is a very serious matter and will cause considerable loss to the merchant and the railway company. I must ask you please to have this beach removed and the berth levelled without delay."

In 1901 there was a complaint that the schooner *Kirkstein* had got damaged at the berth, but apparently nothing came of that.

The only reason I use it is that at this time the railway company were complaining that a vessel had been damaged at this berth, and they wrote at once to the harbour authorities to see to it, recognizing that they were the proper authorities for that purpose. In 1902 there was the case of the steamer *Balder*, when the same sort of thing happened, the railway company wrote again to the harbour authorities calling attention to complaints that were being made, and then comes this last case, that of the *Bearn*.

Looking at the Acts of Parliament, looking at these letters, looking at the whole course of the history of the harbour authority in regard to this berth, I think it is perfectly clear that the harbour authority had the duty of seeing that these berths, including this berth outside the Old Quay, were kept in a fit condition for vessels using this harbour and berth, and, having the duty to see to that, if by neglect of their duty a vessel got damaged, they are responsible for it.

The *Bearn* came in on October 22 at high water, she took the ground at low water that evening, and apparently took the ground at low water again the next morning, and the next morning it was noticed that she had strained, and that evidently she was damaged by some hard substance under her bottom which had forced up some of her deck, and as I have said, it was not disputed that this was caused by a hump in the berth.

The harbour authorities do not seem themselves to have done anything to this berth for the last eighteen months before this date; they rely on the pilots. I do not think in law that that is any defence. I think that they cannot be heard to say, "We expected somebody here to do our duty," when those other persons do not owe them any legal authority or legal obedience. Therefore on this point I am of opinion that the harbour authorities are to blame, basing my decision on the case of the *Mersey Docks Trustees* v. *Gibbs* (1) in the House of Lords.

I have omitted one matter which I ought perhaps to have referred to, viz., the first of the by-laws made by the harbour authorities pursuant to their Act of Parliament. It runs thus: "The master of any vessel entering the harbour or dock shall properly moor the said vessel under the direction of the harbour-

(1) L. R. 1 H. L. 93.

master or his assistant, and shall take care while the vessel is so moored that there are at all times a proper buoy and buoy rope to every anchor ordered to be laid out for moorings, and that all booms and boom irons are taken off the yards and that the jib and mizzen booms are rigged in and the yards topped up." There are penalties imposed for non-obedience to the by-laws. The *Bearn* when she came in was not moored by the harbour-master, the harbour-master did not take any trouble in the matter, and as far as I can see the harbour-master in this case had forgotten all about the by-law. He did not seem to make it any part of his duty to look after ships coming into this harbour and of seeing where they were berthed and whether they were properly berthed or properly moored, and it seems to me that Shoreham Harbour has been conducted latterly in a very remarkable way, because the harbour authorities charge all these fees and dues, and as far as I can see there is no person told off to see that this by-law is carried out, and the harbour-master in this particular case did not even know that this particular vessel was coming in and did not know she was in until some time after she had been moored. I should have thought that the proper course would have been that there should have been somebody stationed at this harbour to take charge of vessels coming in, and see that they were properly moored at proper berths. This has not been done, and therefore it emphasizes the judgment I am giving, that I consider the harbour authorities responsible in this case for the vessel being properly moored in a safe and proper berth, and that inasmuch as they took no steps whatever with regard to this berth to see that it was in a proper and safe condition, and took no steps whatever to have this berth cleared out, they are responsible for any misfortune that happened to this vessel at this berth.

Now about the railway company. The railway company are the owners of the Kingston Wharf which included this Old Quay. They, under an Act of Parliament, have power to make charges on all vessels which come in and discharge at that dock. I have pointed out that it is recognized that the harbour authorities had charge of this berth at the wharf, and the railway company probably had reason to believe—I take it so for the purposes of this case—that the harbour authorities were responsible for the berth being kept in proper condition.

As far as I understand, the custom has been allowed to grow up in Shoreham Harbour for the broker to communicate with the pilot, and for the pilot to take the vessel to the berth where the broker wishes the vessel to be taken to. A postcard has been put in which they say is the usual sort of thing, shewing how the pilots simply take the authority of the broker as to where to take the ship.

On this occasion the pilot was told by the broker to take the ship to this particular wharf, and it was taken to that wharf for this reason, that the cargo was chiefly flour, and was consigned to Messrs. Rubie & Adams, who are lessees from the railway company of a warehouse on this wharf, and at that warehouse this cargo was to be unloaded and stored. That is what was done, and the railway company received through Messrs. Rubie & Adams, the consignees of the cargo, fees and dues which this vessel had to pay for using their wharf—fees and dues, as I understand, which they have the power to levy under their own private Act of Parliament. That surely imposes a duty upon the railway company, if they invite vessels to come to their quay for the purposes of the wharf of the railway company. There was, I think, quite apart from the question of *The Moorcock* (1), although that is very much in favour of the view I am taking, an implied warranty to any vessel coming in there that she is to be placed in a proper and safe berth. If that is so it imposes upon the railway company who invite these vessels to come in and discharge at their wharf some duty of seeing that the place where these vessels are coming is a fit and proper place, before the vessels come there. I do not say that they have the same duty as the harbour authorities have of always being on the look-out to see whether this dock, or this berth, is perfectly right, but I do think there is a duty imposed upon them when they know a ship is coming in, and they invite her to come in, to see that before that ship comes in, the berth is in a proper and safe condition.

Take this particular case; the harbour authorities and the railway company knew of the one important fact in this case, which is that a steamer, the *Worthing Belle*, had been lying in that berth day by day for nearly a month. We have not been told what her tonnage is, she is not a large vessel, she is a paddle steamer, and plies for passengers going pleasure trips between Shoreham and Brighton, and Worthing, and various places along that coast, and her home seems to be Shoreham Harbour: she coals at this berth, and that is a matter which ought not to be lost sight of so far as both the railway company and the Shoreham Harbour authorities are concerned. It is common knowledge that, when a vessel is coaling, lumps of coal do by accident get down into the water, and the Elder Brethren, who know this place, tell me it is common knowledge that the bed of the channel at that place is a hard bottom; it is a bottom into which if a hard substance gets deposited upon it, it will not sink, as if it were mud, down to another level, but it will remain an existing projecting lump above the level of the bed of the channel.

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(1) 14 P. D. 64.

There is a by-law which says that vessels are not to discharge ashes in this harbour. It was known to both these authorities that the *Worthing Belle* had been lying there day by day from the beginning of the month to the day when this mischief happened, and was lying alongside this quay night after night and coaling there, and, therefore, there was every reason to take precautions that, first of all, the by-law against discharging ashes had not been broken, and, secondly, that in the coaling operations no damage should be caused by lumps of coal being dropped over; but, apparently, all that happened in the month of October is this, that without any authority from the harbour-master, but simply because they thought it was wise themselves, some of the pilots of Shoreham Harbour, on October 3, sounded this particular berth, and they say now—they did not report anything to the harbour-master, or to the harbour authorities—but they say that they found that the berth was in a proper condition. On October 23 there was a hump in the berth nearly two feet high above the actual bottom of the channel, and extending over a considerable number of feet; but more than that, the effect of the tides, obstructed by this hump, had caused a depression which was gradually altering the whole of the shape of this berth, and anybody who knows the effect of a heavy stream, or heavy tide meeting an obstruction, knows that the result is that behind or below this hump, or obstruction, a hole is sure to be gradually carved out, and that is what happened here. Not only was there this hump, but there was below the hump, at the time the matter was investigated, a considerable depression in the bed of the channel at this place, which increased the height of the hump, so that the original hump being about eighteen inches or two feet above the natural level, there was to the eastward of it, that is down below where the ebb tide would make the hole, a depression, making the hump a good deal higher.

In my view that ought to have been discovered. The harbour authorities say: "It is no duty of ours; we rely on the pilots." The railway company say: "It is no duty of ours; we rely upon the harbour authorities." It is my view of this case that both those contentions are wrong. Neither has to rely upon the other. In one case there is a statutory duty imposed to keep this place safe, and that is a statutory duty imposed upon the harbour authorities. The other case is that of the railway company. They have a duty imposed upon them, by reason of the fact that they are allowed to make charges there by inviting vessels for reward to come to their wharf, to see that the berth where these vessels are to lie, it being a berth at which vessels have to take the ground at low water, is fit and proper for a vessel to take the ground on.

For these reasons I think that both these sets of defendants are to blame.

One word as to the cases which have been cited. In *Mersey Docks Trustees* v. *Gibbs* (1), Gibbs was the owner of the cargo in that case, and another plaintiff (Penhallow), was the owner of the ship, and the judgment given in the House of Lords grew out of a previous decision. The suggestion originally was that these authorities, created by Act of Parliament, being public bodies, not in the nature of private commercial concerns making a profit to their own advantage, were not in the same position with regard to the public as commercial undertakings were; but that was first of all disposed of by an earlier case of *Mersey Docks and Harbour Board* v. *Cameron* (2), where it was

(1) L. R. 1 H. L. 93.

(2) (1865) 11 H. L. C. 443.

held that these authorities were in the same position as commercial undertakings and were liable to be rated, and further, in the particular case of *Mersey Docks Trustees* v. *Gibbs* (1), and the other plaintiff, it was decided that, though they were a public authority, they were not thereby free from responsibility with regard to the public; so that where a public authority, in that case a dock company, had permitted a dock to be silted up with a great accumulation of mud, they were liable for the damage caused thereby. They were liable on two grounds, which were put in a later case in the House of Lords—if you did not know you ought to have known, and you are liable for not having taken the natural course to ascertain whether this dock was in a fit condition, therefore it was negligence that you did not do that; and if you did know then you are negligent in allowing the matter to remain as it was and invite the vessel to use that dock knowing it to be unsafe: see also *Parnaby* v. *Lancaster Canal Co.* (2), a somewhat similar case. Exactly the same reasoning applies to this case as far as the harbour authorities were concerned—if they did not know they ought to have known; but clearly there was a duty imposed upon them of keeping this berth in proper order, and they do not seem, as far as I can see, to have taken proper steps. Admittedly for some three weeks they had done nothing to this berth, although they knew the *Worthing Belle* had been lying there. If they did know, as is suggested they did know in this case, of course they should have remedied it.

That is, as far as I can see, the law affecting harbour authorities. They are in exactly the same position as any other public authority created by Act of Parliament with very large powers—not only as against individuals who are affected by the harbour, but with regard to the public who use the harbour—of making orders, by-laws, and extracting fees and dues, and the responsibility attaching to them is the same as to a private commercial company.

With regard to the railway company, I think that *The Moorcock* (3) is very much in point, and I am going to read one or two passages from the judgment of Lord Esher in that case. There the wharf belonged to the defendants, and the river belonged to another person altogether. The action was brought against the wharfingers. "The appellants"—that is the wharfingers—"can find out the state of the bottom of the river close to the front of their wharf without difficulty. They can sound for the bottom with a pole, or in any way they please, for they are there at every tide, and whether they can see the actual bottom of the river at low water is not material. Supposing at low water there were two feet of water always over the mud, this would make no difference. Persons who are accustomed to the water do not see the bottom of the water with their eyes; they find out what is there by sounding, and they can feel for the bottom and find out what is there with even more accuracy than if they saw it with their eyes, and when they cannot honestly earn what they are desiring to earn without this, it is implied that they have undertaken to see that the bottom of the river is reasonably fit, or, at all events, that they have taken reasonable care to find out that the bottom of the river is reasonably fit for the purpose for which they agree that their jetty should be used, that is, they should take reasonable care to find out in what condition the bottom is, and then either have it made reasonably fit for the purpose, or inform the persons with whom they have contracted that it is not so."

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(1) L. R. 1 H. L. 93.

(2) (1839) 11 A. & E. 223.

(3) 14 P. D. 64.

That is the judgment of Lord Esher, which was agreed to by Bowen L.J. and Fry L.J., who agree that wherever there is an owner of a wharf who invites vessels, for reward, to come to their wharf, they have an implied duty thrown upon them by reason of that invitation, and in taking money for the use of their wharf to see that the berth should be in a proper condition. In this particular case it is not the duty of the railway company to keep this berth in proper order; that I agree, but it is their duty to find out before they allow a vessel to come there whether it is or is not in proper order. If it is not in proper order there are two duties imposed upon them, one is to caution the vessel invited to come there either that it is not in proper order, or if they do not know about it, to caution when they are not sure it is in proper order, and give them a proper warning which a vessel might take, but beyond that it is their duty if the berth is not in proper order, and has not been properly inspected by the harbour authorities to give notice to the harbour authorities at once, and say, "You must put it right, or satisfy yourselves that it is right, because we have a vessel coming in." This is a duty which the law imposes upon the railway company in this particular case, and in my view both these authorities are to blame, and they will have to share in the payment of the damages which are recovered.

Both defendants appealed.

Dec. 14, 15, 16. *Carver, K.C.*, and *Leck*, for appellants (defendants), the Shoreham Harbour Trustees. For the convenience of shipowners and consignees of cargo, the practice, according to the evidence, is for the ship's broker to advise the local pilots that a vessel is coming in, and that she is to go to a particular berth. The harbour-master is not consulted, there being no statutory duty on him to give directions as to which of the private wharves the vessel is to be taken. Vessels must come in at or about high water, but damage of the nature sustained by the *Bearn* can only be done at low water, and to guard against the possibility of such damage it is incumbent upon the pilots, under the by-laws issued by the harbour trustees and approved by a judge of the High Court, to keep themselves acquainted with the depth of water and with the shape and slope of the bed of the channels, and by the instructions issued to them by the Brethren of the Trinity House, whose servants they are, they are required to sound once a week or oftener at the places mentioned in those instructions which include the berths at the wharves. They are further bound to record the result. It is in evidence that they did, in fact, carefully survey this particular berth on October 3, but they made no report, as no obstruction then existed. The harbour trustees were entitled to rely upon these soundings, and there is, therefore, no evidence of any want of reasonable care on the part of the harbour trustees. The learned judge in the Court below has put the duty incumbent upon the trustees too high. He says that there is a duty "imposed upon them by reason of their taking tolls to see that the places where these ships go are proper places fit and safe for those ships"; but the duty cannot be put higher than that of using reasonable care: *Reg.* v. *Williams* (1); that is, the plaintiffs must shew that the harbour trustees, having the means of knowing, were negligently ignorant of the condition of the berth: *Mersey Docks Trustees* v. *Gibbs.* (2) The hump or obstruction was, however, not there long enough to make it negligent on the part of the trustees not to have removed it, for, assuming that the *Bearn* was damaged by reason of this obstruction, and that this obstruction consisted of coal, ashes, clinkers, bits of broken fire bars and other engine-room rubbish, the fair inference from the evidence is that as the excursion steamer, the *Worthing Belle*, was about to lie up for the winter those in charge of her, before moving out to make room for the *Bearn*, wrongfully threw this stokehold refuse overboard, and, the *Worthing Belle* being a paddle steamer, the port, out of which the stokehold refuse would be thrown, would be some distance from the side of the wharf, and that would account for the *Bearn* sitting upon it. If that be so no care on the part of the harbour trustees would have detected the mischief, for they could not be reasonably expected to do more than examine the berth periodically, and, in the circumstances, such periodical examination would have failed to discover the hump, for the reason that it was not, in fact, there until immediately before the arrival of the *Bearn*. According to the evidence this part of the harbour is swept twice in the twenty-four hours by the tide, and any accumulation that might otherwise arise is carried away, and as the berth in question had been recently surveyed by competent persons, viz., the pilots, acting under the authority of by-laws issued by the harbour trustees, it is submitted that the plaintiffs have failed to make out any case of negligence against the trustees in not taking steps to remove an obstruction of the existence of which they could not reasonably be expected to know.

Pickford, *K.C.*, and *D. Stephens*, for appellants (defendants), the London, Brighton and South Coast Railway Company. The defendant railway company does not own this outside berth, nor does the ship pay dues to the railway company for making use of the wharf. Any charges that are made are levied on the consignees of such cargo as is discharged on to the wharf. The position of the railway company towards the plaintiffs is, therefore, very different from that of the other defendants, the Shoreham Harbour Trustees, in whom the soil of the berth in question is vested, and who levy extra tolls on vessels unloading cargo within the harbour.

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(1) (1884) 9 App. Cas. 418, at p. 431.

(2) L. R. 1 H. L. 93, at pp. 96, 104.

The case of *The Moorcock* (1) was relied upon in the Court below as fixing the railway company with liability; but, in that case, there was no obligation on the Thames Conservancy or on any other body to keep the berth in order: see the judgment of Fry L.J. (2) Here there is a harbour-master, appointed by the trustees, specially charged with the duty of keeping himself "acquainted by sounding and otherwise with the condition of the channels and berths"; and there are pilots also specially required to sound not only by the by-laws of the trustees, but "once a week or oftener" by direction of their masters, the Brethren of the Trinity House. It is no part of the duty of the railway company to test the soundings taken by others; it is sufficient for the company to know that these soundings are being taken from time to time by competent and qualified persons. If the railway company had not known that these persons were charged with the duty of ascertaining the condition of the berth, and had not seen them from time to time engaged upon the work, then, possibly, some liability might attach to the company in their capacity of wharf owners, if they did not satisfy themselves as to the condition of the berth, or warn those in charge of vessels about to use the berth that they did not know whether it was safe or not; but there was not, as stated in the judgment "an implied warranty to any vessel coming in there that they are to be placed in a proper and safe place," and, according to the evidence, the company did not know that the vessel was coming, and, therefore, could not have warned those in charge, even if the company had had any reason to suppose that the berth was otherwise than in good order. The cause of the damage appears to have been the wrongful act of those in charge of the *Worthing*

(1) 14 P. D. 64. (2) Ibid. 71.

Belle in throwing overboard stokehold refuse in contravention of the rules of the harbour trustees, and the plaintiffs should proceed against the owners of that vessel to recover the damage they may have sustained.

[Reference was made to *The Calliope* (1) and *The River Lagan.* (2)]

Laing, K.C., and *Stubbs*, for respondents (plaintiffs), the Compagnie Maritime de la Seine, owners of the *Bearn.* The defendants, the harbour trustees, at first repudiated responsibility on the ground that the berth and wharf were the property of the other defendants, and that the negligence, if any, was that of the railway company. The owners of the *Bearn* then claimed against the railway company; but were met with a similar repudiation of liability, the railway company asserting that the berth alongside Kingston Wharf was part of Shoreham Harbour and, therefore, vested in the trustees, and that the negligence, if any, was that of third parties to them unknown. The defence of the harbour trustees broke down at the trial, as the berth was, in fact, part of the harbour for which the trustees were responsible, and they, therefore, shifted their ground, as did also the railway company, and alleged that it was the duty of the pilots to ascertain by sounding the condition of the berth, and report; but this defence also broke down, for, as pointed out by the learned judge in the Court below, the by-law upon which the trustees relied, is of doubtful validity, as harbour authorities cannot avoid responsibility by delegating their duty to persons who are not their servants. It also appears from the judgment that the Elder Brethrén, who were assisting the judge in the Court below, emphatically protested at the employment of the pilots otherwise than as the servants of the Trinity House, and it is obvious that their duties relate to the safe navigation of vessels entering and leaving the harbour at or about high water, and not to the state of a berth at low water, when the vessel is aground and the services of a pilot are no longer required. As regards the other defendants, the defence as to the pilots is of no avail, as it at least lay upon the railway company, in their capacity of wharf owners, to ascertain if the

(1) [1891] A. C. 11.

(2) (1888) 6 Asp. M. L. C. 281.

pilots were performing the duty cast upon them, that is to say, to ascertain whether the berth was reasonably safe before they invited the plaintiffs' vessel to come alongside their wharf, or, in accordance with the decision in *The Moorcock* (1), to give notice that they had not ascertained whether it was safe or not.

On appeal a further defence has been raised in this Court, on behalf of the harbour trustees, viz., that the *Worthing Belle* being about to lie up for the winter, the stokehold refuse was thrown overboard by that excursion steamer just before leaving the berth to let the *Bearn* come in, and, therefore, that there was no opportunity of detecting the mischief: but there is no evidence of this, and the inference is the other way, for it appears that the *Worthing Belle* did not proceed to lie up until some days afterwards; and, in any event, the trustees cannot be excused on this ground, as the case of *Mersey Docks* v. *Gibbs* (2) shews that a harbour authority receiving tolls is liable for damage through a cause of mischief which was unknown to them, if by their negligence its existence was not known. In this case the harbour trustees took no trouble to ascertain from time to time whether the berth was in proper condition or not, but left it to the pilots.

Both defendants are, therefore, liable—the harbour trustees for failing in their duty to use reasonable care to keep the berth in a fit condition, whilst the railway company are liable for failing to ascertain whether it was reasonably fit, or failing to warn those in charge of the vessel that they had not ascertained whether it was fit.

Carver, K.C., in reply.

COLLINS M.R. These are appeals from a decision of Bargrave Deane J., who has held that the defendants, both the Shoreham Harbour Trustees and the London, Brighton and South Coast Railway Company, are respectively liable to the owners of the steamship *Bearn* for the damage sustained by that vessel, owing to the defective condition of a berth in Shoreham Harbour, where she was lying.

The *Bearn*, a French vessel carrying grain, was brought by a pilot, under the direction of the brokers for the consignees, to

(1) 14 P. D. 64.

(2) L. R. 1 H. L. 93.

Kingston Wharf, which is a wharf in Shoreham Harbour belonging to the defendant railway company. The harbour is under the control of the first defendants, the Shoreham Harbour Trustees, and they are under obligations as to its maintenance, and as to sounding and the removal of obstructions, and a number of other duties, imposed upon them in the broadest possible terms by their Acts of Parliament.

The vessel sustained serious damage owing, as is now admitted, to the defective condition of the berth where she lay, and an action was brought against each of the defendants charging them with responsibility for the damage by reason of negligence on their part. These actions were tried together, and no doubt it lies upon the plaintiffs to make out their case. Counsel for the harbour trustees contend that the plaintiffs have not discharged the burden which is on them. That is, in the particular circumstances of this case, rather a difficult point to set up, for when I come to look at what their case is with respect to their duties in this matter I find that, by their statement of defence, they in terms deny that there was any duty upon them at all. They plead as follows: "There was and is no duty on the defendants to make and maintain the said berth in a safe and proper condition, nor are they or their servants required to ascertain if the said berth was in a proper condition, and, if unsafe or dangerous, to warn the plaintiffs of the fact. The said berth and adjoining wharf are the property of and maintained by the London, Brighton and South Coast Railway for their own use and profit and for the purposes of loading and discharging vessels, and the plaintiffs' steamship *Bearn* came to the said berth at the invitation and request of the said company for the purpose of discharging her cargo at their wharf. If the bottom of the said berth was not in a fit and safe condition (which is not admitted), the same was due to the negligence of the said company or their servants, for whose acts or negligence the defendants are not responsible." In their answer to interrogatories, they take up the same position in a still more emphatic manner. They say, after asserting that the duty is on the London, Brighton and South Coast Railway Company, "there is no duty on the part of the defendants to vessels coming to or lying at the said wharf to provide a safe berth or ascertain its condition, or give warning if the berth is unsafe. The defendants relied, as they reasonably might, on the proper discharge by the said railway company of their duty to vessels using the said wharf." That is the attitude of the defendants who are now asserting that there is no prima facie evidence of negligence against them. They begin with an absolute disclaimer of all duty, and they do that in face of the admitted fact that this berth was in a defective condition. Under those circumstances, it seems to me that the plaintiffs have gone a long way to throw the onus upon the defendants, who certainly have a primary and absolute duty, to put it at the lowest, to take reasonable and ordinary care that this berth, among other places in the harbour, shall be safe. To my mind the plaintiffs have discharged the onus upon them and thrown back upon the defendants, who dispute any obligation, the burden of shewing that they were not negligent. It seems to me that it is a somewhat difficult position for the defendants to extricate themselves from. The terms of the duty imposed upon these defendants are to be found in 56 Geo. 3, c. 81, an Act which has been supplemented by later Acts; but s. 27 of the original Act begins by defining the limits of the harbour, which clearly embrace the locus in quo in this case, and proceeds: "Shall and are hereby empowered, authorized, and required to deepen, cleanse, scour, and enlarge the channel of the said harbour within the limits aforesaid, and to make a new pier or piers, with the necessary wharfing, to confine the channel opposite to and near the intended entrance to the said harbour, which they are hereby required to open, and from time to time to amend or improve as they may see expedient." Then follow words empowering them to provide dredgers and hoppers for removing the shoals within the limits aforesaid, and to construct lighthouses, &c., and to make and effect such other works within the aforesaid limits "as shall be necessary for improving and preserving the navigation of the said harbour, and the use thereof by the persons trading thereto, and for that purpose to dig, take up, remove, and carry away any rocks, stones, soil, sand, gravel, rubbish, or other gross matter which shall obstruct, prejudice, or hinder the navigation of the said harbour and the improvement thereof"; and also to remove any "obstructions or impediments whatsoever which may in any way hinder or prevent the navigation of the said harbour," for the purpose of "preserving the navigation and use of the said harbour within the limits aforesaid, and rendering the said harbour safe and commodious." Therefore, there can be no doubt whatever that the first defence set up by the defendants, the Shoreham Harbour Trustees, namely, that they were under no duty, hopelessly breaks down. So, in my opinion, does the second position taken up by them, which is a corollary of the first, namely, that the obligation was not on them because it was on the other defendant, namely, the railway company. It was not on the railway company. There was nothing to derogate from the absolute duty primarily imposed upon the Shoreham Harbour Trustees, and if they chose to rely upon somebody else doing the duty they took the risk of whether that other person performed the duty or not. There is a prima facie case, not merely of negligence, but of absolute declining on their part to accept an obligation.

The question then arises, is the mischief that happened traceable to the negligence of the defendants? With respect to the trustees, we start, as I have said, with a complete declining of any duty at all on their part, and that is followed up by corresponding conduct, namely, a total abstention on their part from taking any steps whatever to assure themselves that the berth in question is in a safe condition. They took no steps whatever either in the shape of actively dredging to remove obstructions or seeing for themselves whether obstructions were there or not. They do not pretend they did it. They simply had the hope and expectation that other people, not in their service, namely, the pilots, might do their duty so efficiently as to make it of no consequence whether they (the harbour authority) did their duty or not. Now, the question being whether the harbour authority took reasonable care, and the fact being that they took no care to do the work themselves, or to examine for themselves whether other people had done it, if they are going to rely upon the acts of other persons as being an act of reasonable care on their part they are certainly fixed, I think, with an obligation to shew, by the clearest possible evidence, that those persons have so acted as to make it unnecessary, whether they had a duty or not, for them (the harbour authority) to do anything more to keep the berth safe. When we come to examine the evidence, however, we find again that they have done practically nothing. Their harbour-master does not seem to take a very lofty view of his duties as harbour-master—certainly in respect of that part of the harbour—and if he assumed that the pilots were doing something in the way of dredging, what, precisely, they were doing he does not seem to have thought it worth while to inquire; and, as far as we know, the sort of information at his disposal, by going to the records, did not inform him, and certainly did not inform him that the pilots had dredged this position at such short intervals as to shew with reasonable certainty that the place had been dredged at all; because the actual records in the pilots' book shew no operation conducted by them between February 4, 1903, and October 3 of the same year—some three weeks before the accident in this case. That is the position of the defendants, the harbour trustees.

Now comes what is really the main defence of the harbour trustees, and, in fact, the only shadow of defence which, it seems to me, they have raised in the argument in this case. They say, agreed there was an obstruction, which resulted in the damage, and which was existing on October 22, the day on which the *Bearn* met with her injury, the particular mischief which caused that injury may have arisen on October 21, and if it arose on October 21 we had no reasonable opportunity of examining the berth and removing the obstruction before the *Bearn* came in, though, judging from their previous conduct, there was not even a remote chance of their availing themselves of that opportunity. They say, we begin by assuming that the accident that led to the formation of this hump in the berth and rendered it unsafe happened immediately before the *Bearn* got into the berth on October 22, and there was, in the circumstances in which she took that berth, no interval between the *Worthing Belle*, which lay there, and to which we impute the act which made the berth unsafe—there was no interval between her departure and the entrance of the *Bearn* long enough to make it reasonable for us to have examined the berth; and consequently there is no case of negligence made out against us—no negligence causing the damage. To begin with, that entirely rests on the assumption that the mischief which made the berth unsafe was caused by the very last act of the *Worthing Belle*, before she left this berth; and it is assumed by counsel on behalf of the trustees that it must have been done in the night preceding the afternoon of October 22. They found that assumption upon this theory, that the *Worthing Belle*, being about to lie up for the rest of the year, the season being at an end, availed herself of the opportunity of lying at this berth to disgorge all the accumulated rubbish in the stokehold, and disgorged it with a view to a final clearance before lying up for the winter. When we come to look at the facts, however, we find that she was not about to close for the season that night. She performed her ordinary trip for, I think, three days afterwards, and the justification for the suggestion that she disgorged that rubbish in the morning or night before the damage to the *Bearn* happened entirely breaks down. What is the evidence with regard to when it did happen? The defendants themselves took no steps to find out when it happened. They cannot assist us, because they took up a position of absolute negation; but the evidence detailed by the learned judge, and upon which he based his own conclusion, points to my mind much more in favour of a gradual accumulation of the rubbish. Bits of old iron, and so forth, from the stokehold, gradually deposited, led to an accumulation of sand round about, as the learned judge describes, and ultimately a considerable hump formed on the bed, which made it unsafe. The learned judge has not drawn the inference that it was done in one day, which is the only theory that will suit counsel for the trustees, who also say that you cannot reasonably expect the harbour authority to examine this berth every time a vessel leaves it, and as this must have happened on the last occasion, or very shortly before the last occasion, it is unreasonable to expect them to have examined it before the *Bearn* came in. That may be, but it is not an argument to be raised by a person who has never examined the berth at all. If he had examined it once a week or once a fortnight, he might have contended that he was entitled to rely upon his examination once a fortnight or once a week, and it might then be said it was unreasonable to expect him to make another examination in less than a fortnight. That argument, however, is not open to a person who, being under an obligation to take reasonable care, has never done anything at all, and can only be brought in by assuming that this accumulation came immediately before the *Worthing Belle* vacated the berth in order to give place to the *Bearn*. I do not know that the point, in fact, is good even upon that hypothesis, because it would have been possible, I suppose, to examine the berth before the *Bearn* came in—and, never having taken any steps to ascertain the condition of the berth, it was still obligatory upon the persons responsible for the condition of the berth, namely, the harbour trustees—to take the opportunity of the *Worthing Belle* being moved to find out what the condition of the berth was. For the reasons I have given, however, I think the evidence does not point to this hump being created on the night or day preceding the accident. I should draw the inference that there was a gradual accumulation which may have been going on for days ; but putting it as high as possible in favour of the harbour authority, in my opinion there were ample grounds for the learned judge to come to the conclusion that by ordinary care on the part of the persons whose absolute duty it was to use reasonable care in respect of this berth, the defective state of the berth could have been discovered before the *Bearn* came in. Therefore, I am clearly of opinion, that there is no answer on the part of the Shoreham Harbour Trustees to the liability which the judgment of Bargrave Deane J. imposes upon them.

Now comes the case for the railway company, as to whom there is no doubt, something more is to be said ; but I have come to the conclusion that they also are liable. There is no doubt there is an obligation upon the harbour authorities; without doubt there is also an obligation upon the railway company. They are not the persons responsible for the condition of the berths in the harbour. They are the owners of a wharf—a wharf with a berth for steamers in front of it—and it is absolutely essential to the user of the wharf that there should be a berth in front of it, but they are not the persons charged with the duty of keeping the bed of the harbour and berths in proper order; and they are aware that other people, are responsible. What is their duty? It seems to me that it cannot be put better than by Bowen L.J. in the case of *The Moorcock*. (1) The learned Lord Justice said: "No one can tell whether reasonable safety has been secured except themselves, and I think if they let out their jetty for use they at all events imply that they have taken reasonable care to see whether the berth, which is the essential part of the use of the jetty, is safe, and if it is not safe, and if they have not taken such reasonable care, it is their duty to warn persons with whom they have dealings that they have not done so." Here the railway company are inviting persons to come to their wharf for the purpose of gain to themselves, and the persons who come are not mere licensees, but by coming give the owners of the wharf an opportunity of taking a toll—perhaps that is not the word—of taking a sum of money from others, the consignees, for the use of their wharf. They cannot earn that sum of money without the assistance of the vessel coming to the wharf. It is not the case of a pure licensee coming. It is the case of a person coming at the invitation of the wharf owner, and the duty of the wharf owner is, therefore, higher than that of a mere licensor.

Taking the measure of duty as laid down in the passage of Bowen L.J.'s judgment that I have just read, there is an implication on the part of the wharf owner that he has taken reasonable care to ascertain that the condition of the berth is safe, and if it turns out to be unsafe he cannot shelter himself by saying he did not know it. He could shelter himself by shewing that he did take reasonable care to find out; and, knowing himself how much care he has taken, if that care is not reasonable, and he has not reasonable ground for thinking the berth safe, he is fixed with the obligation of telling the person coming in that he does not know what is the condition of the berth. His liability cannot be put lower than that. It is the low-water mark. Taking that standard, have the railway company taken reasonable care to satisfy themselves that the berth was in a safe condition? It is clear that they did not warn the ship that they did not know what the condition of the berth was, and therefore they are liable unless they can shew that they have taken reasonable care to satisfy themselves that it was in a safe condition. Here, again, we find that they simply rely upon the chance of other people—it turns out to be the pilot's in the end—doing all that is necessary with regard to the safe condition of this berth. They do not really know what those other people have done, because they do not take any steps to inform themselves, except that they have seen those other people moving about in a way to suggest dredging. Whether they found anything there the railway company did not take any steps to inquire. That, I think, is not an unfair interpretation of the evidence. This one passage in the evidence of the company's wharfinger sums up a series of questions: "You leave it to chance whether the pilots tell you whether there is anything the matter with the berth, or not?—Certainly. And for yourself and your company you take no steps at all?—Not unless I know there is something there." In further cross-examination he admits that he had taken no steps to find out whether there was anything there. As to this particular occasion of October 3, which counsel for the harbour trustees have relied upon, the company's wharfinger was in a state of ignorance. He had seen the pilots there some time or other, but whether it was on October 3 he did not know. It seems to me that he is not in a position to shew that he took reasonable care to ascertain the condition of a berth as to which he has a duty to perform.

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(1) 14 P. D. 64, at p. 70.

Now we come back to the pilots, who have to bear the whole weight of the obligation to keep the berth in a proper condition. To begin with, it does not appear to me that there is any duty imposed upon the pilots in this particular matter. They are under an obligation to the Trinity House, which lays down the standard of duty for them, and they are required to take soundings once a week, but, as has been pointed out, the pilots are not examining for the special purpose of seeing whether the berths are in a safe condition for vessels to lie in, but they are examining, primarily, for the purposes of their own concerns—namely, the safety of the means of access or egress in and out of the harbour, and about it. That might embrace the examination of the particular locus in quo, but the object would be simply to see whether the navigable passage was obstructed. Therefore, the main basis on which the defendants erect their structure of reasonable care seems to me to break down. The obligation of the pilots did not embrace an examination of the particular contour of the bed of the berth. If they have examined it it is an accident. In this particular case the harbour trustees and the railway company have never taken any steps to ascertain what the pilots did know about the berth and what they had done, and the pilots themselves, instead of examining, even for their own purposes, once a week, as the Trinity House has appointed, do not pretend that they have examined it more than once a fortnight; and I very much doubt, on the evidence, whether they have examined it anything like so often as once in three weeks.

The result is that these two defendants are both resting for their defence upon speculation of what other people, who might have a duty to perform in this matter, have done—resting upon speculation of what they chose to assume those other people had probably done. They seem to shelter themselves, for their own failure to do what they were bound to do themselves, behind the hope that other people have done something, which, if they had done it, would not relieve the defendants from the responsibility for not doing what they ought to have done. I think on both points in the case Bargrave Deane J. was perfectly right. I do not stop to criticize in detail one or two sentences in the judgment which the ingenuity of counsel singled out for comment. There may be some ground for saying that one passage, taken by itself, put the wharf owners' obligation higher than what I have called the low-water mark laid down in *The Moorcock* (1), but when it is examined with the context I do not think the learned judge departed from that authority. Even if he did, there was, in my opinion, on the principles laid down in that case, abundant ground for establishing this liability. Therefore the appeals must be dismissed.

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(1) 14 P. D. 64.

Romer L.J. I have come to the same conclusion. It is clear that the damage to the *Bearn* was caused by the existence of the hump at the bottom of the berth where the ship was lying, and that that hump ought not to have been where it was.

I will first take the case of the harbour trustees. They had a general duty imposed upon them by statute to keep the channel of the harbour clear, including that part of it where this berth was, and they are liable if damage is caused by their negligence in the performance of that duty. Did they neglect their duty with reference to this berth? I think they did. It is clear from their statement of defence, and their answers to interrogatories, that the position they have taken up and acted upon for a considerable time is this, that they were not bound to clear this berth at all, but that the railway company were under some obligation to do so, or had some duty cast upon them with reference to this berth which relieved them, that is, the harbour trustees, of all liability in regard to this berth. The evidence of their harbour-master, Mr. Catt, and of the clerk, Mr. Baguley, shews this, although in their original instructions to their harbour-master, they clearly point out to him that it was part of his duty from time to time to take proper soundings in the channel and berths, but—I suppose for the reason of the attitude they took up as to their liability—they never did for some years dredge this particular berth. Among other excuses which they put forward for their conduct is this: They say, that this particular berth was so well scoured by the tide that they were entitled to assume it needed no practical supervision—that it could not have become unsafe except from some unexpected accident which they were not bound to provide against or bound to inquire as to its existence. In my opinion that position cannot be maintained. It appears from the evidence of the old harbour-master, Mr. Swales, that when he was harbour-master, which I think was from 1873 to 1885, he thought that this berth was liable to be silted up, and one with regard to which he considered it to be his duty to take frequent soundings. When that evidence was given it obviously so impressed counsel for the harbour trustees that they recalled Mr. Hackett, the wharfinger at this berth, in order to try and extract from him that, whatever might have been the condition of affairs when Mr. Swales was harbour-master, matters had improved since. The evidence of Mr. Hackett, however, was to the effect that, so far from improving, matters were worse; so that if frequent soundings and inspections were necessary in the time of the old harbour-master, they were still more necessary at the present time.

Another suggestion has been urged before us on behalf of the harbour trustees. It is said that they were free from any obligation to take soundings by themselves, or to take active steps by their own servants, in reference to the matter, because of the directions given to the pilots; but these pilots were not the servants of the harbour trustees, and owed no duty to them, nor did the harbour trustees supervise them or see that they sounded sufficiently often or properly, not with regard to navigation, but with a view to ascertaining the condition of the bottom of the berth with reference to the question of vessels coming to the berth and having to lie, at low tide, on the bottom of the berth. The obligation imposed upon the pilots by the rule with regard to soundings was with reference to pilots acting as such to any vessel entering or leaving or within the harbour or dock, and for the purpose of enabling the pilot "to qualify himself efficiently to navigate such vessel in and out of the harbour or dock." It is to be borne in mind that pilots bring in and take out their vessels at high tide, and such steps as they have to take or would take as to their soundings are for the purpose of their own information, and are with reference to the question of navigation and not directly with reference to the question of the safety of a berth on which ships have to lie. It further appears on the evidence that the harbour trustees contented themselves with waiting until somebody reported to them whether the berth required attending to or dredging, and when that was reported to them they dredged. That was the beginning and end of the way they performed their duty with regard to their obligations; and it is noticeable here, on the evidence before us, that some three weeks elapsed without the pilots taking any soundings whatever, and it cannot be said that no soundings could have been effected in that period of three weeks immediately before the accident, for the *Worthing Belle* was the only vessel in this berth during that period, and was out practically every day on excursions. There was ample time for the discharge of the duty of sounding this berth.

The harbour trustees then, further, say that although there may have been, and assuming there was, neglect on their part in the performance of their duty, that did not cause the harm that occurred to the ship. They say that on the evidence we ought to hold that this hump was caused by some single discharge by the *Worthing Belle*, or in so short a time that no diligence on their part would have enabled them to discover it. It is difficult for the harbour trustees to make out that they—who wholly neglected their duty in this respect—would not have discovered this hump, if they had done their duty, in time to have prevented any vessel from coming in after the *Worthing Belle* went out. It appears to me that if the harbour trustees had performed their duty the existence of this hump would have been detected, and ought to have been detected, before the *Bearn* came in. On the evidence I do not think it is established that this heap was the result of some sudden discharge of rubbish by the *Worthing Belle* when she left, or shortly before she left, the berth and the *Bearn* came in. The suggestions made by the harbour trustees for the assumption that it was a sudden discharge, are, first, that probably the weather was so rough during this period, during the last few days the *Worthing Belle* was there, that she could not get rid of the refuse in the usual way at sea. Unfortunately for their contention, we have a record of the weather, and it was not a rough time. Then they suggest that the *Worthing Belle* was going out, just before the *Bearn* came in, for the purpose of lying up, and therefore made a final clearance, probably, of the stokehold. That, again, is not the fact. On the evidence I do not come to the conclusion that the hump was a matter of sudden creation; and even assuming that the hump was not there to a noticeable extent on October 3, having regard to the pilots' evidence—though I have already referred to the reason for the pilots' sounding—that it was not a sounding necessarily to find out the exact configuration of the bottom, but only for the purpose of navigation—yet, even assuming that there was no noticeable hump existing on

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October 3, in my opinion the defendants were not justified in letting nearly three weeks elapse without taking any soundings of this berth. On the evidence as to the hump I come to the conclusion that this injury to the *Bearn* would not have been caused had the defendants, the harbour trustees, not been negligent in the performance of their duties. Therefore, I think their appeal fails.

Now as to the railway company. Their duty, apart from any special circumstances of this case, may, I think, be taken from what Bowen L.J. said in *The Moorcock* (1): "They, at all events, imply that they have taken reasonable care to see whether the berth, which is the essential part of the use of the jetty, is safe, and if it is not safe, and if they have not taken such reasonable care, it is their duty to warn persons with whom they have dealings that they have not done so." The railway company did not, in fact, do any acts or take any active steps to discharge that duty. Their case is that they were entitled to be passive on two grounds—first, that the harbour trustees had the duty cast upon them to which I have previously referred; and, secondly, that the pilots take or have to take soundings. With regard to the first point, namely, the duty of the harbour trustees, in my opinion the fact that the harbour trustees had also a duty cast upon them did not free the railway company, as the owners of the wharf, from their duty, or justify a perfectly passive attitude on their part. I think that any vessel entering the harbour and berth was entitled to rely upon both the duty cast upon the harbour trustees and also the duty cast upon the railway company, as owners of the wharf, inviting ships to come there for remuneration. It is not suggested that the railway company had observed in fact, or had taken steps to observe, whether the harbour authorities were properly attending to their duty in regard to this berth; and, as I have pointed out, we know that the harbour trustees had not done their duty. It is a curious commentary on this contention on the part of the railway company to see the two contentions of the defendants together. The harbour trustees say: We did not do our duty because we relied upon the owners of the wharf, the railway company, doing theirs.

(1) 14 P. D. 64, at p. 70.

The railway company, the owners of the wharf, say: We are excused from doing our duty because we rely upon the harbour trustees doing theirs. In my opinion, the vessel was entitled to require both defendants to do their respective duties, and I do not think, therefore, the railway company can escape from their duty by seeking to shift the sole responsibility on to the shoulders of the harbour trustees. Next, with regard to the pilots. I have already dealt with their position, what they were instructed to do, and for what purpose; and it appears to me that the railway company were not entitled to regard the duties and acts of the pilots as justifying the company in simply standing by and doing nothing. Moreover, the railway company did not, in fact, take any steps to see whether the pilots sounded sufficiently often or whether they did their work in a way which would be satisfactory and efficient, not for the purpose of navigation by the pilots, but for the purpose of seeing whether the berth was a safe one for vessels to lie in. The true position taken up by the railway company is that which is shewn by the passage from the evidence of Mr. Hackett, read by the Master of the Rolls. On these facts I hold that the railway company did not discharge their duty, and that but for their neglect this accident would not have happened. Consequently their appeal also fails.

SIR GORELL BARNES, PRESIDENT. This case has been so fully dealt with by the judgments of the Master of the Rolls and Romer L.J. that I only desire to state quite shortly how the matter presents itself to me.

The *Bearn* came into Shoreham Harbour to discharge her cargo in circumstances which are stated in the course of the evidence and which are not in dispute. She was seriously damaged by the improper state of the berth in which she was placed. A claim was then made by the plaintiffs against each of these defendants for the negligence which led to that damage. Each defendant by his defence practically denies that any duty whatever was imposed upon him with regard to this ship in relation to the berth; but when the case was argued before this Court it was quite clear, and in fact counsel conceded, that there was a duty upon each of these defendants in relation to this berth and to this particular ship in the circumstances in which she came into the port. What the extent of the duty in each case was, has been fully pointed out in the judgments which have already been delivered, and I agree with the statement of the duty cast upon each defendant indicated in those judgments.

The duty then being established in each case, the next question is whether there was any breach of the duty imposed upon each defendant, and I think it is quite clear, after the evidence has been fully considered, that the duty was in each case not properly discharged, because neither defendant is able to shew that he did anything whatever in connection with the discharge of the duty imposed upon him.

The substantial defence in each case is this: We ourselves did nothing, but we sufficiently performed our duties—if it can logically be so put—by leaving this matter connected with the berth to the pilots of the port. Upon that point there is a passage in the learned judge's judgment to which I wish to refer. He says: "And there the Elder Brethren of the Trinity House agree with me. They say: 'These pilots are our servants, and not the servants of the harbour-master or the harbour board, and we protest against their being made the servants of the harbour authorities. They have got their own duties to perform, in which they look to us as their masters, and we object to anyone else having any authority over them.'" I do not desire that anything I say should in any way minimize the duties cast upon pilots by instructions from the Trinity House, or which may possibly be put upon them by the by-laws of the defendants; but it is clear, when their position is considered, that their duty is a duty to themselves and the ship which employs them, and is really put upon them with the object of enabling them, as the by-law says, efficiently to navigate a vessel or vessels in and out of the harbour or dock. In my opinion, they are not duties placed upon them for the purpose of enabling them to discharge the duties of the harbour trustees or railway company; and the mere fact that the pilots do from time to time make an examination to qualify themselves to perform their own proper special duties appears to me to be not in any way in relief of duties cast by law upon the two sets of defendants in this case.

Now, having established both the duty and the breach of it, the only remaining question is whether the damage followed from the breaches of duty on the part of the defendants. Here we have a dangerous berth, and damage which undoubtedly followed from the vessel being placed in it. Is the evidence sufficient to shew that had the defendants discharged their duties the state of the berth might have been discovered and the damage prevented? I do not desire to add anything to what has already been said by the other members of the Court, because they have analyzed the evidence upon that point, but it seems to me, stated broadly, that there was ample evidence upon which the learned judge was entitled to act in finding that the damage was a consequence of the breach of duty on the part of each of the defendants in this case.

Appeals dismissed.

Solicitors for appellants (defendants), the Shoreham Harbour Trustees: *William A. Crump & Son.*

Solicitors for appellants (defendants), the London, Brighton and South Coast Railway Company: *Rose & Co.*

Solicitors for respondents (plaintiffs), the owners of the *Bearn*: *Stokes & Stokes.*

T. L. M.

C. F.
1906
Feb. 5.

[IN THE COURT OF FACULTIES.]

IN THE MATTER OF CHARLES GOBLE CHAMPION, A NOTARY PUBLIC.

Ecclesiastical Law—Notary Public—Inherent Jurisdiction for proper Cause to strike Notary Public off Roll of Notaries—Discretion—25 *Hen.* 8, *c.* 21, *ss.* 3, 4 —*The Public Notaries Act*, 1801 (41 *Geo.* 3, *c.* 79), *s.* 10—*The Public Notaries Act*, 1833 (3 *&* 4 *Will.* 4, *c.* 70), *s.* 4—*The Public Notaries Act*, 1843 (6 *&* 7 *Vict. c.* 90), *s.* 9—*The Stamp Act*, 1891 (54 *&* 55 *Vict. c.* 39), *s.* 44.

The Court of Faculties has inherent jurisdiction to strike a notary public off the roll of notaries public, and can exercise this jurisdiction in any proper case where it is not precluded from doing so by statute.

A solicitor of the Supreme Court of Judicature in England, admitted and enrolled a notary public under the Public Notaries Act, 1833, was struck off the roll of solicitors for professional misconduct in relation to property of which he had been appointed administrator. Thereupon, after notice to him as respondent, an application to strike him off the roll of notaries public was made in the Court of Faculties.

The Master of the Faculties being of opinion that the Court of Faculties had inherent jurisdiction to grant the application, ordered that the respondent should be struck off the roll of notaries public.

THIS was an application on behalf of the Society of Provincial Notaries Public of England and Wales to strike Charles Goble Champion off the rolls of notaries public.

A memorial signed by the president and secretary of the Society of Provincial Notaries of England and Wales on January 4, 1906, was brought into the registry of the Court of Faculties on a subsequent day of the same month. It stated that "Charles Goble Champion, of Eastbourne, in the county of Sussex, a solicitor and notary public and a member of the Society of Provincial Notaries Public of England and Wales, was on November 10, 1905, struck off the rolls of solicitors by order of the Lord Chief Justice of England, in accordance with a report of the Disciplinary Committee of the Law Society as appeared by certified copies of the order and report annexed to the memorial," and prayed that in consequence thereof the Master of the Faculties would be pleased to strike off the said C. G. Champion from the rolls of practising notaries and

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withdraw his notarial faculty or take such other disciplinary steps as he might think expedient.

On this memorial being presented a notice calling on C. G. Champion to attend and shew cause why he should not be struck off the rolls of notaries public issued from the registry of the Court of Faculties, and together with a copy both of the order of the Divisional Court of the King's Bench Division of the High Court of Justice and the report annexed to the memorial was served upon him; and he having appeared as respondent the applicants brought into the registry the original order made by a Divisional Court of the King's Bench Division of the High Court of Justice, ordering the respondent to be struck off the roll of solicitors of the Supreme Court, and an affidavit made by S. P. B. Bucknill, the secretary of the Statutory Committee appointed under the Solicitors Act, 1888, verifying a copy of the report of that committee filed in the Crown Office on August 24, 1905, in support of the notice of motion to strike the respondent off the roll of solicitors. From the contents of the report of the committee so verified it appeared that upon certain findings therein come to and upon facts appearing therein, the Statutory Committee had reported that C. G. Champion had been guilty of professional misconduct within the meaning of the Solicitors Act, 1888.

The application was now heard before the Master of the Faculties (Sir Lewis Dibdin, D.C.L.).

The nature of the professional misconduct of which the respondent was reported by the Statutory Committee to have been guilty, so far as material to this report, sufficiently appears from the judgment.

The respondent appeared in person to oppose the application and submitted to the judgment of the Court with respect to the question of the jurisdiction of the Court to strike a notary public off the roll of notaries public, but contended that the misconduct of which he had been reported guilty was not so connected with his conduct as a notary public as to require the Court to strike him off the roll of notaries public. He contended that the report of the Statutory Committee upon which the order of the High Court of Justice striking him off the roll of solicitors proceeded contained incorrect findings, and he asked the Court to refer the question of his alleged misconduct to the registrar of the Court of Faculties to report upon.

Frank Phillips, for the Society of Provincial Notaries Public of England and Wales, in support of the application. First, the Court of Faculties possesses jurisdiction to strike an offending notary public off the roll of notaries public: Brooke, Office of a Notary, 6th ed. p. 37; Phillimore, Ecclesiastical Law, vol. 2, p. 945; and this jurisdiction is inherent in the Court of Faculties, and has not been conferred expressly by statute except in a few particular instances, such as in cases under the 10th section of 41 Geo. 3, c. 79, which provides for any notary public being struck off the roll of notaries public compulsorily and without any discretion allowed to the Court if the name of the notary is proved to have been allowed to be used by persons not entitled, or under s. 4 of the Public Notaries Act, 1833, whereby any notary public appointed under that Act practising beyond his district is expressly made liable to be struck off the roll of notaries public. This inherent jurisdiction—a jurisdiction in every respect similar to the jurisdiction inherent in the Common Law and Chancery Courts in the case of attorneys and solicitors—is treated as existent by the Legislature in the 6 & 7 Vict. c. 90, as the 9th section of that Act obviously presupposes that up to the time of its passing notaries public were liable to be struck off the roll in all cases on account of the defects of articles of clerkship, service, registration, admission and enrolment there mentioned, and for the future forbids the striking off of any notary from the rolls on account of such defects except in cases of fraud or application within twelve months. No precedent has been found of any notary public having been struck off the roll for misconduct generally, but neither has any precedent been found of any removal from the roll under the above-mentioned statutes, and this want of precedents may be in consequence of the small number of notaries, or the great care always taken as to those admitted; but however this may be there can be little doubt that cases of removal from the roll must have been known before the transfer of the jurisdiction to the Court of Faculties under 25 Hen. 8, c. 21. Whilst, however, there appears to be no record of any removal from the roll of notaries, either in England or in Ireland, it would seem that in the case of *O'Brien* v. *Bennett*, Keatinge J., sitting in the Court of Faculties in Ireland, asserted that that Court did possess the jurisdiction contended for, observing in his judgment as follows : "My jurisdiction as judge of the Court of Faculties (1) is to grant faculties to fit persons and in fit cases, and if the persons to whom these faculties are granted misconduct themselves, I have power under the statute (2), and I have power independently of the statute, to withdraw their faculties, but otherwise I have no power to regulate the conduct of their business." (3) This dictum is the more material as the jurisdiction of this Court and of the Court of Faculties in Ireland —now vested in the Lord Chancellor of Ireland—is derived from the same source. Moreover, on general principles the power to put a notary public on the roll of notaries must carry with it the power to strike off the roll.

Secondly, assuming the jurisdiction to strike off the roll to belong to this Court, it ought to be exercised in the present case, and the Court has ample materials for the exercise of its discretion in the order of the Divisional Court of the King's Bench Division, and the report of the Statutory Committee on which that order proceeded. If the respondent is allowed to remain on the roll of notaries he will be entitled as a notary public to conduct the very same kind of business his conduct with regard to which was found by the committee of the Law Society to be professional misconduct. This is clear from the 44th section of the Stamp Act, 1891, relating to the matters which a notary public may legally do without being subject to a penalty.

[He also referred to 6 & 7 Vict. c. 73, ss. 2, 32, and 62 & 63 Vict. c. 4.]

The respondent replied.

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(1) As to that Court see 7 & 8 Geo. 4, c. 44, entitled "An Act to provide for the payment of a salary (in lieu of fees) to the judge of the Prerogative Court and Court of Faculties in Ireland," 33 & 34 Vict. c. 110, s. 29, and 40 & 41 Vict. c. 57, ss. 16, 71.

(2) See 28 Hen. 8, c. 19 (Irish); 2 Eliz. c. 1, s. 1 (Irish), and Bullingbrooke, Ecclesiastical Law of the Church of Ireland, ed. 1770, vol. 1, pp. 114, 124.

(3) *O'Brien* v. *Bennett*, Court of Faculties (Ireland). Not reported. April 21, 1860.

Feb. 5, 1906. THE MASTER OF THE FACULTIES. This is an application on behalf of the Society of Provincial Notaries Public of England and Wales that the name of Mr. Charles Goble Champion should be struck off the roll of notaries public. The first question I have to consider is whether I have any jurisdiction or power to strike off the roll a notary public who has once been admitted and whose appointment has been enrolled. The jurisdiction which I as Master of the Faculties exercise on behalf of the Archbishop of Canterbury in the matter of notaries public was created by the statute of 25 Hen. 8, c. 21, and that jurisdiction is exercised as part of the general transfer to the Archbishop of Canterbury of the Pope's jurisdiction in the matter of dispensations, but so far as I am aware no case exists, at any rate neither I nor Mr. Phillips can find any instance where the Pope is recorded to have revoked a faculty appointing a notary public. At the same time, I have great difficulty in believing that no such power was exercised, and in my opinion it is in the highest degree improbable that the Pope did not possess jurisdiction to determine a notarial faculty. The statutes dealing with notaries public in England which have been referred to by counsel, I think take for granted the power of the Master of the Faculties to strike a notary public off the roll, for sufficient reason. There are express powers in certain of these statutes to deal with particular offences by striking the name of the notary off the roll: see 41 Geo. 3, c. 79, s. 10, and 3 & 4 Will. 4, c. 70, s. 4. These are statutes, the material sections of which are directed to particular offences created by or mentioned in those sections. The statute which seems to me to be the most important, as shewing that a general power to strike a notary public off the roll of notaries public resides in the Master of the Faculties, is the Public Notaries Act, 1843 (6 & 7 Vict. c. 90), because, without conferring any power to strike a notary public off the roll, the 9th section of that statute assumes that the power to strike off exists. It enacts that that power should not be exercised in particular cases which are specified, except where complaint is made within a specific time, or there has been fraud. The inference from this 9th section is most clear that where there has been fraud or

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defects in the articles of clerkship or other initiatory stages of becoming a notary public, the Master of the Faculties may strike a notary public off the roll, although the section does not itself confer any such power. It assumes the existence of a general inherent power in the Master of the Faculties to deal with notaries public in the way contended for. Turning to what has been stated in text-books, I find in the first edition of a well-known work on notaries by Mr. Brooke (Treatise on the Office and Practice of a Notary of England, by Richard Brooke, 1839, p. 15) a statement that the power of striking a notary public off the roll of notaries for sufficient cause does exist. The passage is as follows: "On a complaint made in a summary way to the Master of the Faculties and supported by affidavit or other proof, an offending notary will be liable to be struck off the roll of faculties and disabled from practising, for permitting his name to be used by an unqualified person, or if admitted under a limited faculty, for practising out of the district specified in it, or for any deceit or imposition resorted to in obtaining his faculty or for any improper or disgraceful conduct in his practice; and it is apprehended that wilfully certifying to any act as done on one day when the notary knew that it had occurred on another, or ante-dating any instrument in order to deceive, would be considered as an offence of that class; and at this place it may be proper to mention, that the Master of the Faculties would notice, in a very serious manner, the conduct of a notary who should intentionally lend himself to assist in any fraud or evasion of the stamp duties imposed upon notarial acts or instruments, in addition to any consequences to which he may have exposed himself under the provisions of the stamp Acts."

Now nearly all the causes here mentioned for which a notary public may, according to the author, be struck off the roll of notaries do not rest on the provisions of any statute, but on the inherent jurisdiction of the Court. Further, it is not to be forgotten that the author whom I have quoted was himself an experienced notary, and I think, therefore, I must take the passage referred to as some evidence of what the jurisdiction and power of the Court really is. I am indeed not aware of any case which has dealt with the matter in the English Courts, but there is a case in the Court of Faculties in Ireland which I think is worthy of passing reference. That is the case of *O'Brien* v. *Bennett* (1), which was heard in the year 1860, before Keatinge J., who was exercising the powers of the Commissary of the Faculties under the Irish statute (2) which created the existing jurisdiction in Ireland relating to notaries public. In the course of that case the learned judge said he had power under statute and *independently of statute* to strike notaries public off the roll. The Irish statutes relating to notaries in Ireland are almost the same as those relating to notaries in England, and the two sets of statutes are precisely the same in this, that they do not expressly confer a general power to strike notaries public off the roll of notaries. If, notwithstanding this, the power to strike off exists in Ireland, I apprehend that such a power must also exist in England. I do not quote the judgment I have referred to as at all decisive on the point, but in the absence of authority I think it is of some importance.

At first I was struck with the fact that there was no precedent in the Faculty Office here of the exercise of the power of striking off the roll, supposing the power to exist. That may be accounted for partly by the great care which has been observed with respect to the choosing of notaries. Moreover, it is equally true that there is no recorded instance of any notary public having been struck off the roll for any of the statutory offences above mentioned. I do not think it safe to assume from the absence of any recorded instance that the power to strike off the roll has never been used. The record of its having been used would be less easily found than the record of the appointment of a notary public. The records of the grants of faculties in the Faculty Office are very well kept and are complete from the sixteenth century to the present time, but although diligent search has been made no instance of any notary public having been struck off the rolls or of a faculty withdrawn has been found. Still I am not prepared to say, and in fact I think it would be misleading to say, that because no record of the exercise of the power to strike off has been found no case of the exercise of the power ever existed.

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(1) Court of Faculties (Ireland), April 21, 1860. Not reported.

(2) 28 Hen. 8, c. 19 (Irish).

On these grounds I have come to the conclusion that I have as Master of the Faculties an inherent power to deal with the roll of notaries public of which I am the custodian, and that for a proper cause—a cause likely to interfere with the proper discharge of the functions of a notary public—it is competent for me as Master of the Faculties to remove the name of a notary public from the roll.

Master of the Faculties.

It remains to consider whether I ought to exercise the power in Mr. Champion's case. The materials I have before me are the order of the High Court of Justice striking Mr. Champion off the roll of solicitors and the report of the Statutory Committee of the Incorporated Law Society, which states the grounds on which his name has been so ordered to be removed. I have listened with care to the observations which Mr. Champion has addressed to me, and with a keen anxiety to find, if I could, any reason which would lead me to come to the conclusion that the position is altered or changed from what it was when the matter was before the High Court of Justice. I cannot, however, find that there has been any change in the position which then existed. It is not my desire or duty to say more than this, that I have read the report and listened to Mr. Champion's observations, and I cannot come to any conclusion other than that I think I must act so far as any finding of fact is concerned on the order of the High Court of Justice and the report of the Statutory Committee. I do not say I should be acting without jurisdiction if I ordered a fresh inquiry into the facts, but I do not propose to enter into any fresh inquiry in this case. Accepting, therefore, the findings of fact come to in the report of the Statutory Committee and the result of the proceedings which have ended in Mr. Champion being struck off the roll of solicitors, I have to consider whether the professional misconduct which has led to that result ought to lead me to strike Mr. Champion off the roll of notaries public.

In the sixth edition of the work I have above referred to

Master of the Faculties.

(Brooke's Treatise of the Office of a Notary, 1901, p. 36) I find the following passage: "Great is the confidence reposed in notaries and onerous are their duties. Hence the necessity of their being distinguished for extensive knowledge, probity, discretion and zeal."

Trustworthiness being thus the basis of the position of a notary public, I feel that to allow to remain on the roll of notaries public a notary who has been guilty of misconduct such as that of Mr. Champion in the present case—misconduct in relation to property of which he had been appointed administrator—and in whose trustworthiness it is impossible any longer to believe, would, when I have the power to strike him off the roll, not be right on my part. Beyond this, as has been pointed out to me by Mr. Phillips, the duties which are capable of being performed both by notaries public and solicitors so overlap that, if Mr. Champion be not struck off the roll of notaries public, he would be able as a notary to perform the very same sort of duties, for professional misconduct in the performance of which, he has been struck off the roll of solicitors—a result which would almost seem ludicrous. With very great reluctance I must therefore accede to the prayer of the memorialists and order that the name of Charles Goble Champion be struck off the roll of notaries public.

Solicitors for the applicants: *Bell, Broderick & Gray.* (1)

(1) For other reported instances of proceedings in the Court of Faculties, see *Graham* v. *Smart,* (1863) 9 Jur. (N.S.) 387; *Tunbridge* v. *Mathews,* [1903] W. N. 158; *Eaton* v. *Watson,* [1904] W. N. 24; and *Bailleau* v. *Victorian Society of Notaries,* [1904] P. 180.

C. F. J.

[IN THE COURT OF APPEAL.]

C. A.
1906
Jan. 31.

THE MARPESSA.

Admiralty—Collision—Demurrage of Dredger—Measure of Damage.

In ascertaining, on the principle laid down in *The Greta Holme*, [1897] A. C. 596, the measure of damage sustained by a dock board by reason of a collision with their dredger through the negligence of the defendants' servants, the Court will, in the absence of proof of direct pecuniary loss, and in respect of that part of the claim of the plaintiff board which is in the nature of demurrage, award such a sum as will be sufficient to compensate the board for the actual out-of-pocket expenses properly chargeable against the dredger during the period of her detention for repairs, together with depreciation and loss of interest on capital during the delay, such depreciation and interest being calculated on the capital value of the dredger at the time of the accident.

Appeal by plaintiffs, the Mersey Docks and Harbour Board, owners of the *G. B. Crow*, against a decision of Sir Gorell Barnes, President, in favour of the respondents (defendants), the owners of the steamship *Marpessa*.

The case involved the question as to the principle upon which a claim, in the nature of demurrage, for the temporary loss of the use of a dredger, damaged by collision, is to be calculated.

The facts are fully set out in the report in the Court below (1), and may be shortly summarized as follows:—

The *G. B. Crow*, owned by the appellants, is a suction dredger, built in 1895 at a cost of 56,700*l.*, and was designed for, and is continuously employed in, the dredging of the bar and the sea channels of the river Mersey as part of the conservancy work of the dock board. On October 6, 1904, whilst she was sheltering from the weather in the river Mersey, she was run into by the steamship *Marpessa*, and sustained damage to repair which involved laying the vessel up for nine days. Her value at the time of the collision, allowing for depreciation at 7 per cent., was estimated at 33,736*l.*, and her life was considered to be good for some five or six years longer.

The respondents, the owners of the *Marpessa*, admitted liability subject to a reference. The appellants filed in the Liverpool district registry particulars of their claim, to all which the respondents agreed except in respect of an item for demurrage amounting to 102*l.* 9*s.* 5*d.* per day.

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(1) Ante, p. 14.

This figure was arrived at on the assumption that the dock board was entitled to be recouped the amount which they considered it proper to expend on the vessel, and they calculated the average daily expenditure in maintaining and working the dredger from the annual cost for the nine years since the dredger was built under the headings of insurance, repairs, wages, supplies, and expenses of engineer's department, together with depreciation at the rate of 7 per cent. on the original outlay, and owners' profits at the rate of 25 per cent., also on the original outlay.

At the reference the defendants, the owners of the *Marpessa* contended that the principle upon which the calculation was based was wrong, and relied upon the judgment of Lord Herschell in *The Greta Holme.* (1) The district registrar in his report reduced the amount to 35*l.* per day, striking out the head of repairs as already covered in the claim of damage agreed to, and basing his decision mainly on the consideration that 7 per cent. on the depreciated value was a proper allowance to make to cover establishment charges, owners' profits, and general damage.

The dock board moved in objection to the report, and on November 9, 1905, Sir Gorell Barnes, President, dismissed the motion with costs, on the ground that, in respect of the demurrage claimed, the dock board had failed to make out any case for a larger sum than that which the district registrar had allowed.

Carver, *K.C.*, *Aspinall*, *K.C.*, and *Leslie Scott*, for the appellants, the Mersey Docks and Harbour Board.

The arguments of counsel were the same as in the Court below (2), and, in addition to the cases there cited, they referred to *The Kate* (3), *The Mediana* (4), and *Clydebank Engineering and Shipbuilding Co.* v. *Don Jose Ramos Yzquierdo y Castaneda.* (5)

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(1) [1897] A. C. 596, at pp. 604, 605.

(2) Ante, pp. 19 to 22.

(3) [1899] P. 165.

(4) [1900] A. C. 113.

(5) [1905] A. C. 6.

Pickford, K.C., and *Greer*, for the respondents, the owners of the *Marpessa*, were not called upon.

Collins M.R. This is an appeal from a decision of the President, and the question is as to the proper measure of damages in a case where a dredger, the property of the Mersey Docks and Harbour Board, was disabled for a certain number of days. The defendants being admittedly responsible for the damages consequent upon the collision, the question is, What is the proper measure of those damages? We must remember that damages are not a matter of nice mathematical adjustment. Damages, until a recent period, were exclusively in the province of juries, who were not supposed to measure them upon strictly mathematical lines, but had to say what men of ordinary sense and business knowledge would fix upon as the money compensation for the damage sustained.

In this case the result of what I must assume was the defendants' negligence was that this steam dredger was put out of action for nine days, and the learned President, with whose decision we are dealing, came to this conclusion. He said—it is summarized in the head-note to the report of the case in the Law Reports (1)—" In the absence of proof of direct pecuniary loss in respect of that part of their claim which is in the nature of demurrage," the Court will award " such a sum as will be sufficient to compensate the board for the actual out-of-pocket expenses properly chargeable against the dredger during the period of her detention for repairs, together with depreciation and loss of interest on capital during the delay, such depreciation and interest being calculated on the capital value of the dredger at the time of the accident." At the end of his judgment the learned judge says (2): " Applying the principles in the case of *The Greta Holme* (3), a business and reasonable view to take is, that when the plaintiffs content themselves with such evidence as they gave in the present case, this tribunal, in assessing their damages, may say, as a jury would do, we must act with some reasonable certainty, and you, the plaintiffs, are reasonably compensated by being awarded a sum which we are fairly satisfied you may have lost, but we cannot follow you into mere speculation."

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(1) Ante, p. 14.

(2) Ante, p. 33.

(3) [1897] A. C. 596.

The standard which the appellants desire us to assume to be applicable is, as far as I understand it, this. They say: We can shew the first cost of this dredger to us. We assume that its life is fifteen years, and we can also calculate the total expense we should be put to over that period of fifteen years in keeping it in a condition to carry out its work; and we also claim something in the shape of interest upon the total sum expended by us, and also a sum for owners' profits; and having arrived at the aggregate sum represented by all those items put together, which would be the amount at the end of the fifteen years, we now ask you to assess the damages in respect of nine days' detention at the expiration of ten years out of her life—we ask you to assess the damages payable to us in respect of the loss of the use of this vessel for nine days, on the theory that every day throughout the whole period of this vessel's existence is to be assumed to be of equal value to us—that is to say, that the cost which we should incur in respect of every day throughout the whole of the fifteen years would be the same; and as we cannot shew any actual money loss arising from inability to use the dredger, we ask you to say that the damages to us must be at least equivalent to that sum of money which we, as reasonable persons, have been willing to devote to keeping this dredger in existence during those nine days, and that that sum is to be arrived at by treating the share of each particular day as representing an aliquot part of the whole sum, and dividing the number of days into the number of pounds.

It seems to me that that suggested mode of assessing the damages involves at least two assumptions which are not proved. First of all it involves this, namely, that the cost to the Mersey Docks Board for every day during the fifteen years in respect of this dredger is to be taken to be the same. That does not appear to me to be a self-evident proposition, and there is no other evidence upon it. We are dealing here with a perishing subject-matter, and damages are sought upon a calculation which is based upon a fundamental fact—the actual original cost of the vessel with all these other sums added to it. It seems to me that in each succeeding day in the whole period of fifteen years there is a fluctuating factor—that there is depreciation continually going on, and if you are going to introduce, as a factor, into the calculation a sum representing the value of the vessel at a given date, you are bound to take into account the necessary depreciation in value which takes place between the date of first purchase and a date which is two-thirds of the way through the career of the vessel. That is the first point, and the chief point upon which they impugn the decision of the Court below. They say the President's decision involves taking into account from day to day, month to month, and year to year, the depreciation of this vessel, whereas their contention is that inasmuch as the benefit which the vessel was able to confer upon them through each week of the whole fifteen years was the same, there must be attributed to each week, in arriving at a figure to represent the loss of the use of the dredger in any particular week, the same sum for cost.

This last proposition brings me to the second fallacy, as I regard it, in this contention. They have first assumed that the aliquot parts of the cost ought to be treated as equally applicable to every week, and they have assessed their damages in each particular week by reference to the aliquot part of the cost so arrived at; but they have also assumed that throughout the whole period of fifteen years this vessel is equally adequate to the work to be done, and so they must be deemed to receive the exactly equivalent benefit for their expenditure throughout this whole period of fifteen years. That, again, is not a self-evident proposition, and there is no evidence to support it, and therefore I do not think the learned President was wrong in not accepting it, and in not regarding it as proved. Furthermore, we are also asked to assume that the life of this vessel remains the same, and will terminate on the same day, notwithstanding the fact that she has been laid up and not been put to use for the period of nine days, during which she was undergoing repairs. That, also, does not appear to me to be a self-evident proposition, and there is no evidence to shew it is so, or that there may be no extension of the vessel's life by reason of the fact that she has not been worked, as she would have been worked in the ordinary course, during this period of nine days whilst undergoing repairs. Taking all those considerations together and remembering that we are dealing after all with that which is a matter of what is called rule of thumb calculation and adjustment by business men—something which is not capable of mathematical calculation—it seems to me that counsel for the appellants are asking us to adopt a most artificial and technical mode of arriving at a figure which has been arrived at by ordinary business methods, on a proper business calculation, in the Court below. When the elements which form the basis of his own judgment have been taken into consideration, the learned President is of opinion that it has not been made out to his satisfaction that anything else ought to be taken into consideration; and he introduced a most important argument, it seems to me, into that view which he has followed—an argument to which I have really not heard any satisfactory answer in the able arguments addressed to us to-day. He points out that, on the theory advanced by the appellants, they would, claiming as they do about 100*l.* a day, practically in one single year, out of receipts, be able to supply themselves with a new vessel—that is to say, the value of the vessel, taken as it is now, is not quite as high as 33,000*l.*—and on a calculation of 100*l.* a day you practically, at the end of a year, would have replaced the whole of the value. This shews that, whatever is the true standard, that cannot be the right standard of assessing the damages. It is contrary to common sense.

It seems to me, therefore, that in this case we are not called upon to lay down any exact standard of mathematical calculation as the basis upon which these damages are to be assessed, and that the learned President, in directing the line upon which they are assessed, came as near a definition in the proper direction as it is possible to obtain on such a subject-matter. In my opinion, therefore, the appeal fails.

Romer L.J. I am of the same opinion. The only question here is one concerning the loss accruing to the owners of the dredger injured, owing to what is called demurrage—that is to say, the delay in the use of the dredger, resulting from the

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accident, before it was properly repaired. The question of the repairs is not before us. They have been allowed to the owners and will be paid for by those who caused the accident.

In my opinion the appeal fails on the broad ground which has been put by the President in the following words (1): "I do not feel satisfied that the plaintiffs have made out any case for a larger allowance than that which the district registrar has made to them." I am exactly of that opinion.

If I thought that the district registrar in arriving at the amount specified in his report had proceeded throughout on a wrong principle, I might be compelled to say that the matter must be, or ought to be, referred back to him; but I think that cannot properly be said. This is a peculiar case, where the owners of the dredger injured were not using it for profit, and where the evidence does not establish, and it cannot properly be inferred, that the dredger could have been used by them for profit. In that state of things I think the loss they suffered by the delay, which would be the loss to them of the advantages accruing by the work that would otherwise have been done but for the injury, might rightly be taken to be equivalent, roughly speaking, to the cost of that work to the owners, had that work been done. Upon that principle the registrar has proceeded. The appellants contend that in addition they ought to have credited to them something in the nature of imaginary profits. I say imaginary, because upon the facts before us it is not shewn that any such profits could or would have been made. The President, in his judgment, has pointed out several reasons why the contention of the appellants should not be acceded to, and I agree with him, and will not repeat his reasons. In that state of things, as the registrar has proceeded on a right principle, and I think, on the whole, he has awarded a sum which is just, I decline, speaking for myself, to let the amount he has arrived at be upset because he might not, as regards each subsidiary item, have proceeded upon a mathematical basis, according to the plaintiffs' contentions—especially when I find those contentions are based upon certain speculations which I am not prepared to accede to. For instance, there are the assumptions that the dredger would work just as well at the end of its life as when it was new; that the expenditure on the dredger ought to be, and would in fact be, the same uniformly throughout the whole life of the dredger; and, lastly, that the life of the dredger was shortened exactly by the period of the delay during the repairs. Looking at the matter broadly, as I think it ought to be, I can only say in conclusion that I agree again with the President when he said that (1) "a business and reasonable view to take is that when the plaintiffs content themselves with such evidence as they gave in the present case, this tribunal, in assessing their damages, may say, as a jury would do, we must act with some reasonable certainty, and you, the plaintiffs, are reasonably compensated by being awarded a sum, which we are fairly satisfied you may have lost, but we cannot follow you into mere speculation." On these short grounds I think the appeal fails.

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(1) Ante, p. 33.

Cozens-Hardy L.J. concurred.

Appeal dismissed.

Solicitors for appellants (plaintiffs): *Rawle, Johnstone & Co., for W. C. Thorne, Liverpool.*

Solicitors for respondents (defendants): *Hill, Dickinson & Co., Liverpool.*

T. L. M.

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(1) Ante, p. 33.

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[IN THE COURT OF APPEAL.]

THE SCARSDALE.

Admiralty—Wages—Agreement with Crew—End of Voyage—Election by Master—Merchant Shipping Act, 1894 (57 *&* 58 *Vict. c.* 60), *s.* 114, *sub-s.* 2 (*a*), *s.* 115, *sub-s.* 5.

A fireman signed articles of agreement for a "voyage not exceeding one year's duration, to any ports or places within the limits of 75 degrees north, and 60 degrees south, latitude, commencing at Cardiff, proceeding thence to Malta, thereafter trading to ports in any rotation, and to end at such port in the United Kingdom or continent of Europe, within home trading limits, as may be required by the master."

The vessel left Cardiff for Malta, thence she proceeded to the Black Sea, where she loaded a grain cargo to be wholly discharged at Southampton, and, on arriving at the last-mentioned port, the fireman claimed his wages and discharge on the ground that the voyage and the agreement were at an end. The master required the fireman to go on with the vessel to Cardiff:—

Held by the Court of Appeal (Vaughan Williams, Stirling and Fletcher Moulton L.JJ.), reversing the decision of Bargrave Deane J., that, on the true construction of the clause, the master was entitled to require the fireman to go on to Cardiff, for the discharge of the cargo at Southampton did not determine the agreement as the voyage was that of the ship and not of the cargo, a succession of which was contemplated, and by giving the master a right of election as to which of the ports, within the limits of the prescribed district, should, within the period of twelve months, in fact be the final port of destination of the ship, the agreement did not contravene the provisions of s. 114, sub-s. 2 (*a*), of the Merchant Shipping Act, 1894.

Appeal by defendant, Colin McDiarmid, master of the steamship *Scarsdale*, against a decision of Bargrave Deane J. in favour of a claim for wages and compensation made by the plaintiff, Charles Baxter, a fireman on board the same vessel.

The question raised was whether the voyage of the ship and the agreement, set out below, of the plaintiff fireman with the defendant master terminated at the port of discharge of the cargo in the United Kingdom, as alleged by the fireman, or at the next loading port as required by the master, this question turning on the construction to be put on the wording of the agreement as affected by the sections of the Merchant Shipping Act, 1894, relating to engagement of seamen. (1)

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(1) 57 & 58 Vict. c. 60, s. 113: "(1.) The master of every ship except ships of less than eighty tons registered tonnage exclusively employed

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On August 5, 1904, the plaintiff was engaged as fireman on board the *Scarsdale* and signed the ship's articles for "a voyage not exceeding one year's duration to any ports or places within the limits of 75 degrees north latitude and 60 degrees south latitude, commencing at Cardiff, proceeding thence to Malta, thereafter trading to ports in any rotation, and to end at such port in the United Kingdom or continent of Europe (within home trading limits) as may be required by the master."

The *Scarsdale* proceeded from Cardiff to Malta, thence to the Black Sea, and came back under charterparty with a cargo of grain for delivery at Southampton, where the vessel arrived on September 28, and proceeded to discharge, and did discharge, the whole of her cargo there. Whilst the vessel was discharging

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in trading between different ports on the coasts of the United Kingdom, shall enter into an agreement (in this Act called the agreement with the crew) in accordance with this Act with every seaman whom he carries to sea as one of his crew from any port in the United Kingdom."

Sect. 114: "(1.) An agreement with the crew shall be in a form approved by the Board of Trade, and shall be dated at the time of the first signature thereof, and shall be signed by the master before a seaman signs the same.

"(2.) The agreement with the crew shall contain as terms thereof the following particulars—

"(*a*) Either the nature, and, as far as practicable, the duration of the intended voyage or engagement, or the maximum period of the voyage or engagement and the places or parts of the world, if any, to which the voyage or engagement is not to extend."

Sect. 115: "(5.) The agreements may be made for a voyage, or, if the voyages of the ship average less than six months in duration, may be made to extend over two or more voyages, and agreements so made to extend over two or more voyages are in this Act referred to as running agreements:

"(6.) Running agreements shall not extend beyond the next following thirtieth day of June or thirty-first day of December, or the first arrival of the ship at her port of destination in the United Kingdom after that date, or the discharge of cargo consequent on that arrival."

Sect. 116: "(4.) Agreements shall not, in the case of ships of more than eighty tons burden, extend beyond the next following thirtieth day of June or thirty-first day of December, or the first arrival of the ship at her final port of destination in the United Kingdom after that date or the discharge of cargo consequent on that arrival. . . ."

Sect. 742: "'Home trade ship' includes every ship employed in trading or going within the following limits; that is to say, the United Kingdom, the Channel Islands, and Isle of Man, and the continent of Europe between the River Elbe and Brest inclusive."

her cargo in the Southampton Dock the plaintiff asked the master for his wages and his discharge on the ground that the voyage entered into under the articles was completed; but the master claimed the right of fixing on Cardiff, the loading port for the next cargo, as the termination of the voyage, and insisted that the plaintiff was bound to proceed with the ship to Cardiff.

On October 6 the plaintiff summoned the defendant master before the justices of the peace for the borough and county of the town of Southampton under s. 164 of the Merchant Shipping Act, 1894, for the sum of 4*l.* 3*s.* 9*d.*, balance of wages due to him as fireman on board the *Scarsdale*, and 2*l.* compensation.

The petty sessional Court, with the consent of the solicitors on both sides, referred the claim to the Probate, Divorce, and Admiralty Division (Admiralty) of the High Court under s. 165, sub-s. 3, of the Merchant Shipping Act, 1894, and on May 8, 1905:—

Bargrave Deane J., sitting in Admiralty, gave judgment in favour of the plaintiff with costs, as follows:—

[After detailing the facts and reading the clause in the articles, together with the material portions of ss. 113, 114, and 115 of the Merchant Shipping Act, 1894, already set out, and stating that counsel on both sides were agreed that the question raised related to a "voyage" and not to a "running" agreement, the learned judge continued:—]

The first difficulty which arises is to ascertain and state a legal interpretation and definition of the word "voyage." The word is French in origin, and its orignal meaning is "to move afar," or "go abroad," as applied to persons or things leaving the place to which they belonged. The word has inherent in it the sense of movement, and I have no doubt was originally confined to a passing from one given spot to one other given spot, and that that was the meaning attached to the word when it was adopted into the English language. But the meaning of the word has undoubtedly changed, and especially as applicable to ships. I believe the more modern meaning of the word is, so far as an English ship is concerned, the passing of that ship from home to a given port and back again to home, and that this is the meaning which the framers of the Merchant Shipping Act had in view when the wording of s. 115, sub-s. 5, was considered: "The agreements may be made for a voyage, or, if the voyages of the ship average less than six months in duration, may be made to extend over two or more voyages." I read this to contemplate such voyages as those of Transatlantic or Peninsular and Oriental liners, or even cross-channel steamers, which leave their home port, go abroad, and return home, each thus completing a voyage; but it is not inconsistent with this reading of the word "voyage" that the vessel should, after leaving home, go to more than one port abroad before returning home—on the contrary, it would seem to be consistent that, both on the passage out and the passage back, the British vessel should go to more than one foreign country, where she should unload or load and trade, before finally loading for her return home. We speak of a voyage round the world, which infers stopping at many places in transit, but it is all one voyage up to and until the return of the ship home to this country.

I am of opinion that the agreement in this case recognized a voyage in the sense in which I have defined it, namely, from England to Malta, trading with other ports or places within certain degrees of latitude, and back again to England or a port within home trading limits. A port within home trading limits is defined by s. 742 of the Merchant Shipping Act, 1894, and may be taken to be equivalent, for the purpose of a voyage of an English ship, to a return to an English port at the end of the voyage; and provision is made by statute for the crew being brought home to England, if they require it, at the expense of the owners. But this definition of a voyage does not conclude the whole matter. The further question arises: Given that the voyage ends within these home limits, at what place within these home limits does it end? The Merchant Shipping Acts from 1729 downwards do not in terms define the "end of a voyage," but there are three expressions which in my opinion afford a fairly sure guide to what may be taken to be the place where a voyage is to end. "The place of unlivery of the cargo," "the final port of discharge," and "the final port of destination" are terms which will be found fairly frequent in the various Merchant Shipping Acts, and so far as I can judge are intended to be correlative terms, each pointing to what must be taken to be the end of a voyage; and reading them in this light it seems clear to me that, taking the definition which I have before expressed, the end of a voyage is the place where the final or home passage of the whole voyage terminates by reason that it is the place at which the cargo brought home is to be discharged finally. In the case where the home cargo is consigned to more than one place "finally" means that place where the last portion of the cargo is discharged, and the adventure of the ship outward and homeward is at an absolute end, and where she is fully discharged on her return within the home limits.

It was contended on behalf of the master of the *Scarsdale* that the words of the agreement in question: "Such port . . . . as may be required by the master," entitled the master to say to his crew, "True, I have brought home and discharged my cargo, but I have the right to name any other port where my voyage, within home limits, may end, other than the place to which my cargo is consigned and delivered." In support of this contention counsel on behalf of the master read the preamble to the statute of 1729, with the view of shewing that that statute was enacted to protect the shipowners against the possible misconduct of their crews in leaving the ships in places and under circumstances prejudicial to the commercial enterprises of the time. The argument is perfectly correct, but in my opinion, whatever may have been the view or policy which led to the preamble in question, the policy of the mercantile law now is not one-sided, but has in view the protection of seamen as well as shipowners, and it is only necessary to read s. 114, sub-s. 2 (*a*), of the Merchant Shipping Act, 1894, to see that the whole object of the agreement to be made under that Act is to secure to the crew as definite a statement as possible of the nature and duration of the intended voyage.

In my opinion the final words of this agreement which we now have under consideration intend no more than to leave it to the master to say to what port in the United Kingdom or continent of Europe, within home trading limits, he will accept his homeward charter. This construction of the words is consistent with what I have said before as to the meaning of the words "final

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port of destination," whereas the contrary construction—namely, that, having discharged his home cargo, the master is at liberty, if he chooses, under these words, to take another cargo on board at his said port of discharge in the United Kingdom—would render the nature and duration of the voyage so indefinite that it would be contrary to the spirit of that part of s. 114 which I have quoted.

I must add one finding of fact outside the statement of facts submitted to me—namely, that so far as the evidence goes, there is nothing to shew that Cardiff was intended to be the home port of the *Scarsdale*, or that the crew or vessel were in any way connected with that port; nor is there any consideration apparent why, when once the cargo was discharged, the crew should be bound by their agreement to take the ship to Cardiff or anywhere else than the final port of discharge of the cargo. Reading, therefore, this agreement by the light of the Merchant Shipping Act, 1894, I find that it is an agreement within the meaning of s. 114, sub-s. 2 (*a*), and s. 115, sub-s. 5, and that the master, by accepting a charter for a cargo from the Black Sea to Southampton, exercised his power to end the voyage at Southampton, a port in the United Kingdom, as his "final port of discharge," making it thereby his "final port of destination"; that, having so exercised his power, he had no right to require the plaintiff to proceed further with the ship; and that the plaintiff was entitled to his discharge and his wages at Southampton.

1906, Jan. 31, Feb. 1. The defendant, the master of the *Scarsdale*, appealed.

Sir Edward Clarke, K.C., and *Lewis Noad*, for the Shipping Federation on behalf of the appellant (defendant).

The agreement complies with the form, period, and conditions required by s. 114 of the Merchant Shipping Act, 1894. It states the nature and the maximum period of the intended voyage, together with the places or parts of the world to which the agreement is not to extend. The agreement is, therefore, valid, and it is submitted that the construction put upon the final words of the agreement by the learned judge in the Court below is incorrect, viz., that the words "intend no more than to leave it to the master to say to what port in the United Kingdom or continent of Europe, within home trading limits, he will accept his homeward charter" for the voyage, on the termination of which the seaman was entitled to claim his wages and discharge, was the voyage of the ship, and not the voyage of the cargo, and the particulars required by s. 114, sub-s. 2 (*a*), of the Act of 1894 to be contained in the agreement in order that it may be valid relate to a voyage which is not defeated by delivery of cargo. Some confusion has arisen owing to the use of the word "discharge" in the Act of 1894 in three different senses, as it refers to the discharge of the cargo in s. 115, sub-s. 6, to the discharge of the crew in s. 218, sub-s. 3, s. 242, sub-s. 1, s. 253, sub-s. 2 (*a*), and to the ship as in the case of arrival at her final port of discharge in s. 239, sub-s. 4. Having regard to the terms of the agreement, the voyage of the ship did not terminate until she arrived at Cardiff, that being the port required by the master—in other words, Cardiff was the termination of the agreed voyage.

The Solicitor-General (*Sir W. Robson, K.C.*), *Sir R. Finlay, K. C.*, *Sir E. Carson, K.C.*, and *Rowlatt*, for the Board of Trade, intervening.

The place where the voyage terminated was the place at which the cargo to be brought home was to be discharged, the final words of the agreement only authorizing the master to decide for what home port he would accept a homeward charter and if the cargo was to be discharged at more ports than one, then at the last port of discharge, so that as the master accepted a cargo to be wholly discharged at Southampton, he made that his final port of destination. The wages of the seaman, therefore, became due at that port—that is to say, the trading voyage, on which the seaman was engaged, came to an end when the ship arrived at her final port of discharge, viz., Southampton, for the master had exercised his option when he selected that home port, which was the last port contemplated or intended on this trading voyage. The word "voyage" is used in the Act of 1894 in the ordinary meaning of a transit at sea from one terminus to another or a passage to and a passage back: see Stroud's Dictionary, or a journey by sea, usually including outward and homeward trips, which are called passages: see the Sailor's Word Book; and assuming the whole round to be one voyage, then on arrival at a port within the limits for selection of the final port of destination, and discharging the whole of the cargo, the voyage of the ship, and the agreement made under s. 114, sub-s. 2 (*a*), of the Merchant Shipping Act, 1894, were necessarily determined, the mercantile adventure having come to an end: see the meaning of the expression "voyage" in respect of a fishing-boat in s. 370 of the Act of 1894. The seaman was, therefore, not bound to go on with the ship whilst she was on her way to Cardiff for the purpose of starting from that port with another cargo on a fresh voyage. Under the Act of 1894 there are substantially only two kinds of agreements, viz., "voyage" agreements and "running" agreements, the object in both cases being to impose, for the benefit of the seaman, a definite limit as a term of the engagement. This agreement contemplates ending the voyage by arrival at any port within the United Kingdom or continent of Europe between the Elbe and Brest, for the expression "ports in rotation" necessarily means ports exclusive of those within home trade limits. Any other construction would render the duration of the voyage so indefinite that it would turn the agreement into a "time" agreement, which would be contrary to the provisions of the Act of 1894, and in construing an agreement prima facie capable of two constructions the rule will be applied by which that construction will be followed which gives the agreement validity. The word "voyage" limits the power to contract, and if the master wanted to retain the services of the seaman beyond Southampton, he would have to do it by a "running" agreement. This agreement is an attempt to fuse the "loading port clause" into the provision for one voyage, the form previously existing having been abandoned as bad by which it was provided that after the return of the vessel to a port of final discharge in the United Kingdom, the crew were required to further agree to proceed to a port to load.

S. T. Evans, K.C., and *Morgan Morgan*, for the seamen's and firemen's union, on behalf of the respondent (plaintiff), adopted the argument of counsel for the Board of Trade.

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Sir Edward Clarke, K.C., in reply.

[The following cases and statutes were referred to:—(1729) 2 Geo. 2, c. 36, ss. 6, 7; (1796) 37 Geo. 3, c. 73, s. 11, and schedule; (1835) 5 & 6 Will. 4, c. 19, ss. 2, 3, 11; 17 & 18 Vict. c. 104, s. 149; 36 & 37 Vict. c. 85, s. 17; *The Minerva* (1); *The George Home* (2); *The Westmoreland* (3); *Tindle* v. *Davison* (4); *Nelson* v. *Dahl.* (5)]

Feb. 2. VAUGHAN WILLIAMS L.J. The question in this case turns on the construction of an agreement entered into between the plaintiff Charles Baxter, a seaman, and the defendant Colin McDiarmid, master of the steamship *Scarsdale*. [The learned judge stated the facts and read the material clause in the ship's articles, already set out, and continued:—] It was admitted by the master of the *Scarsdale* that Southampton was the final port of discharge for the cargo, and I find that "the cargo" in this admission meant the cargo which the master then had on board.

It was contended on behalf of the plaintiff that, as the vessel was going to discharge the whole of her cargo at Southampton, the voyage entered into under the articles was completed, and the plaintiff was entitled to his discharge at Southampton.

It was contended on behalf of the master that the voyage was not ended, and that he could require the plaintiff to go to Cardiff. The question whether the voyage mentioned in this agreement terminated at Southampton, or whether the master could require the voyage to end at Cardiff and refuse to give the seaman his discharge, or to pay him his wages until arrival at Cardiff, depends upon the true construction and meaning of the agreement in question.

In my opinion, looking merely at the words of the agreement, the master would seem to be entitled to require the voyage to end at Cardiff, as being a port in the United Kingdom. I can find no words within the four corners of the agreement which would lead me to say that the voyage mentioned in the agreement determined at Southampton by reason of the discharge of the cargo then on board the *Scarsdale* at Southampton, a port within the United Kingdom, and, therefore, a port within the limits within which the master is by the agreement entitled to require the voyage to end.

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(1) (1825) 1 Hagg. 347.

(2) (1825) 1 Hagg. 370.

(3) (1841) 1 W. Rob. 216.

(4) (1892) 7 Asp. M. L. C. 169.

(5) (1879) 12 Ch. D. 568, at p. 580.

The voyage mentioned in the agreement is a voyage of the ship and not of the cargo.

It was urged on behalf of the Board of Trade that the agreement provided for the ship commencing its voyage at Cardiff, proceeding thence to Malta, and thereafter making a circular voyage trading to ports in any rotation, but necessarily ending the voyage by the arrival of the ship at any port within home trade limits; that is to say, within the United Kingdom or within the continent of Europe between the River Elbe and Brest. Counsel argued that trading to ports in rotation meant ports exclusive of those within home trade limits.

I see nothing in the words of the agreement to justify the contention that the voyage intended by this agreement necessarily came to an end by the arrival of the ship in ballast or with cargo at a port in the United Kingdom or within home trading limits. On the contrary, it seems to me that the words of the agreement give the master a right of election as to which of the ports within the limits of the prescribed district shall in fact be the final port of destination of the ship. Even if the words of the agreement, looking only to what one finds within the four corners of the agreement, were much less clear than they seem to me to be, I should have hesitated long, having regard alike to the interests of seamen and shipowners, before I held that the true construction of this agreement necessitated the engagement of a new crew, in the case of a British foreign-going ship arriving at Hamburg, before she could proceed with the cargo from Hamburg to any port, whether within or without home trade limits.

I will next consider the construction of this agreement, taking into consideration the provisions of ss. 113, 114, 115, and 116 of the Merchant Shipping Act, 1894, and also the provisions and language of that Act generally. [The learned judge read sub-s. 1 of s. 113, as to entering into an agreement with the

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crew, and sub-s. 2 (*a*) of s. 114, as to the conditions to be complied with by the agreement, and continued :—]

It was argued on behalf of the Board of Trade that if the construction above-mentioned, which was the construction contended for on behalf of the master of the *Scarsdale*, was put on the agreement, this construction in effect turned the agreement into a time agreement, and that a time agreement would not be an agreement in accordance with s. 114 of the Merchant Shipping Act, 1894, or with the provisions of that Act taken as a whole. Then they argued that if the words of the agreement were capable of two constructions, one of which resulted in an agreement which was void under the Act and inconsistent with its provisions, and the other consistent with its provisions, the Court ought to adopt the construction consistent with the provisions of the Act, even though such construction should be a non-natural construction or not the construction which prima facie one would give to the words of the agreement.

I agree entirely with this contention, but I do not think that a time agreement, as distinguished from a voyage agreement, would be inconsistent with the provisions of s. 114, or with the provisions of the Act taken as a whole. First let me take s. 114, sub-s. 2, clause (*a*). That clause contains alternative particulars, either of which will satisfy the clause. Under the first alternative the agreement must contain particulars of the nature, and, as far as practicable, of the duration, of the voyage or engagement. It will be observed that this alternative provides not only for particulars of a voyage, but alternatively for particulars of the engagement which, I take it, is not a synonym for a voyage. The second alternative also deals both with an agreement which contemplates a voyage, and also with an agreement which contemplates an engagement. Under this latter alternative the particulars must be of the maximum period of the voyage or engagement, and of the places or parts of the world, if any, to which the voyage or engagement is not to extend.

The difference between these two alternatives is this: that under the first the contractual employment extends to the whole duration of the voyage or engagement, as the case may be; whereas, under the second alternative, the contractual employment must not exceed the maximum period of the voyage or engagement; but may be determined on an event or at a time happening before the determination of the maximum period.

It seems to me that the word "engagement" in both of these alternatives covers a time agreement as distinguished from a voyage agreement. Under the first alternative the agreement has to be for a fixed time; under the second, for a maximum period of time. I am inclined to think that where the agreement is for a maximum period of time the agreement would lack that precision for the information of the sailor which the statute contemplates, unless it stated the occasion or occasions on which the employment might fall short of the maximum period. We have not got to decide this, but assuming this to be the true construction of clause (*a*), it is fully satisfied by the choice given to the master as to the port, within the limits prescribed, at which the voyage is to end, and the time at which, within the twelve months, the vessel shall arrive at the port, within the home trade limits, at which he requires the ship to end its voyage. But then it is said that there are to be found in s. 115 provisions relating to running agreements which by express statement of occasions on which the agreement may be based on time, exclude agreements based on time in respect of foreign-going ships, except on those occasions defined under the head of running agreements. The sub-sections of s. 115 which are in particular relied upon are sub-ss. 5, 6 and 7. [The learned judge read sub-s. 5, already set out, and continued:—] Now, sub-s. 5 provides that an agreement may be made by a foreign-going ship for a voyage, i.e., may be made under so much of s. 114 as relates to a voyage as distinguished from an engagement; but an agreement for a voyage may be made for a maximum period provided it states the places or parts of the world, if any, to which the voyage is not to extend. This being so, it seems to me that, if the agreement under consideration is a voyage agreement which complies with these conditions, we have not to trouble ourselves with the provisions as to running agreements which, as sub-s. 5 states, are agreements made to extend over two or more voyages.

I do not think that this agreement under consideration does extend to two or more voyages. It is a single agreement for one voyage of the ship. Indeed, it was admitted on behalf of the Board of Trade that this agreement, so far as it related to a tramping voyage in the Mediterranean or outside the limits for selection of the port of final destination, was one voyage under a single agreement within the meaning of s. 114. They only contended that arriving at a port within those limits, or at all events arriving at such a port and discharging the whole of the cargo, constituted necessarily a determination of the voyage of the ship. I cannot agree; but I would observe that they did not contend that the agreement was a running agreement, but only that such arrival at a port within the district where the voyage might end terminated the voyage under an agreement made under s. 114.

With regard to s. 116, I have only to say that it does not contemplate agreements for a voyage, and certainly not agreements for a voyage of a foreign-going ship. The word "voyage" does not occur in the section. It deals with agreements for service of crews of home trading ships in a particular ship or of a service in two or more ships belonging to the same owner, so that I do not think we need consider the effect of sub-s. 4 of s. 116.

Having thus far dealt with the question of the validity of the agreement, and the meaning of the word "voyage" in the agreement, I now propose to deal with the meaning of the words in the agreement as to the end of the voyage. The words are "to end at such port in the United Kingdom or continent of Europe (within home trading limits) as may be required by the master." Bargrave Deane J., after dealing with the meaning of the word "voyage" in terms with which I entirely concur, says, with reference to the question, At what place within the home limits does the voyage end?: "The Merchant Shipping Acts from 1729 downwards do not in terms define the 'end of a voyage,' but there are three expressions which afford a fairly sure guide to what may be taken to be the place where a voyage is to end. 'The place of unlivery of the cargo,' 'the final port of discharge,' and 'the final port of destination,' are terms which will be found fairly frequent in the various Merchant Shipping Acts, and so far as I can judge are intended to be correlative terms, each pointing to what must be taken to

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be the end of a voyage; and reading them in this light it seems clear that the end of a voyage is the place where the final or home passage of the whole voyage terminates by reason that it is the place at which the cargo brought home is to be discharged finally. Where the home cargo is consigned to more than one place 'finally' means that place where the last portion of the cargo is discharged, and the adventure of the ship outward and homeward is at an absolute end, and where she is fully discharged on her return within the home limits."

I cannot agree that in this agreement the end of the voyage means the place where the final or home passage of the whole voyage terminates by reason that it is the place at which the cargo brought home is to be discharged finally, or that place where the last portion of the cargo is discharged, and the adventure of the ship outward and homeward is at an absolute end, and where she is fully discharged on her return within the home limits.

The voyage to be ended is the voyage of the ship, not of the cargo. The adventure of the ship outward and homeward does not terminate until the ship returns to the port, within the limits of home trade, where the master elects, within the period of twelve months, mentioned in the voyage agreement, to end her voyage and prepare for a fresh voyage.

I agree also with the criticism of counsel on behalf of the master, upon this part of the judgment of the learned judge, that "discharge" is a word which applies not only to cargo but also to crew and to ship. I cannot agree that the place of "unlivery of the cargo," "the final port of discharge," and "the final port of destination," are either correlative or synonymous terms.

I think that the argument on behalf of the Board of Trade, made it necessary for counsel to say that an express agreement that the voyage should begin at Cardiff and proceed to Bilbao and back to Cardiff, with liberty to call at Southampton and there discharge her cargo, would not be a voyage ending at Cardiff within the meaning of this agreement. It seems to me that that contention involves a most strained construction of the simple words of this agreement.

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In conclusion, I wish to call attention to the judgment of Lord Stowell in the case of *The George Home* (1) and the judgment of Dr. Lushington in *The Westmoreland*. (2) In the latter case Dr. Lushington cites the judgment of Lord Stowell, and without going minutely into the statements which are made by those great judges, it will be seen plainly that in both of those cases the judges took the view that what the Legislature really required was that the agreement between a sailor and the master of a ship should be so expressed as to give sufficient information to the seaman about to be carried on the ship as to the voyage about to be undertaken. In my view, if an agreement sufficiently does this, that is to say, if it gives in sufficiently clear terms the information which the various Merchant Shipping Acts have required should be given to the sailors—that is all that the law requires; and provided that has been done, the sailors are to be treated in all other respects as free men, capable of taking care of themselves and capable of entering into any agreement they choose with the shipowners. I think, therefore, that this appeal ought to be allowed, with costs.

Stirling L.J. The question which we have to decide turns on the construction of the agreement entered into by the plaintiff fireman with the master of the steamship *Scarsdale* in accordance with the Merchant Shipping Act, 1894. By that agreement the plaintiff was engaged "on a voyage not exceeding one year's duration to any ports or places within the limits of 75 degrees north latitude and 60 degrees south latitude, commencing at Cardiff, proceeding thence to Malta, thereafter trading to ports in any rotation, and to end at such port in the United Kingdom or continent of Europe, within home trading limits, as may be required by the master."

It was admitted by the learned counsel for the Board of Trade that the voyage contemplated was one which might be divided into various stages, as for example, from Cardiff to Malta, Malta to the Black Sea, and from the Black Sea to Southampton, and that a full cargo might be taken in or discharged at these various places as circumstances might require.

(1) 1 Hagg. 370.

(2) 1 W. Rob. 216.

It was admitted also by them that the agreement for a voyage of this nature was perfectly valid, provided that the "ports" to which the ship might trade "in any rotation" were ports beyond home trading limits. I assume, without deciding, that this is the true construction of the words.

It was, however, contended that the voyage contemplated by the agreement came to an end when the ship arrived at the final port of discharge of cargo within home trading limits—in this case Southampton—and that the master could not require the plaintiff to proceed to Cardiff with the ship in ballast, though it was not disputed that if the cargo had been only partially discharged at Southampton, the master might have required the plaintiff to proceed to Cardiff in order that the rest might be discharged there.

The most material portions of the Act are s. 114, sub-ss. 2 (*a*) and 3, and s. 115, sub-ss. 5, 6 and 7. The agreement in question falls within the second branch of sub-s. 2 (*a*) of s. 114. Unless therefore, it contains some provision which is contrary to law effect ought to be given to it under sub-s. 3.

The agreement is admittedly not a running agreement within the meaning of s. 115 of the Act. It must, therefore, under s. 115, sub-s. 5, be for a voyage; and if it provides for more than one voyage it is bad. It was argued that on any other construction than that adopted by Bargrave Deane J. it does provide for more than one voyage. In order to test the argument put forward on behalf of the Board of Trade, the case was put to counsel of a voyage "commencing at Cardiff, proceeding thence to Malta, thereafter to the Black Sea, and thence with cargo to Southampton, and (if required by the master) from Southampton to Cardiff in ballast," and it was said—as I think the case of the Board of Trade required—that that would have been not one voyage, but two. I am unable to agree. I think it was only one voyage, longer or shorter as the master might require. I also agree with the contention of counsel on behalf of the master that the voyage contemplated was that of the ship and not of the cargo. In the present case the master is by the terms of the agreement entrusted with the power of determining at what place within home trading limits the voyage is to end. The parties to an agreement of the kind with which we have to deal appear to be left by the Act of 1894 at perfect liberty to fix the commencement and ending of the voyage as they see fit. I think that the master could not use this power so as really to convert a single voyage into two; but in my judgment he has not done so. In my opinion, therefore, the appeal ought to be allowed.

FLETCHER MOULTON L.J. The decision in this case will, in my opinion, be found to turn entirely upon our interpretation of the agreement entered into by the plaintiff seaman. I will not recapitulate the terms of that agreement, or that which was done thereunder, because in the judgments which have been already delivered these matters have been fully stated. What is the interpretation of that agreement?

Now, it appears to me that if the agreement came before the Court, uncomplicated by any references to existing statute law relating to merchant shipping, no other conclusion could be come to as to the meaning of the agreement than that it was a contract for what I may call a "tramp voyage," commencing at Cardiff, having its first station at Malta, with freedom thereafter to trade in any rotation to any ports within such wide limits as practically to include all the ports of the world, for a period of not exceeding one year's duration, with the stipulation that the voyage must end at a port within home trading limits, such port being a port required for that purpose by the master.

With a great deal of that interpretation both the parties to this appeal agree. It is conceded by counsel for the Board of Trade that it was for a "tramp voyage;" that it was contemplated by the parties that the voyage should consist of trips from place to place, accompanied from time to time by shipments of fresh cargo, and by the total or partial discharge of such cargo. The only difference between the two interpretations is this, that counsel for the Board of Trade contend that so soon as the ship arrived at a port within home trading limits—subject to certain stipulations as to discharge of cargo to which I will refer presently—the contract of service automatically came to an end.

I cannot follow that contention. It appears to me that under this agreement a visit of the ship to a port within home trading limits might lawfully occur in two ways. It might occur during what I may call, without ambiguity, the currency of the service, that is, in virtue of the master's right to trade between ports within those wide limits—which include home trading limits—in any rotation; in other words, during the currency of the contract the master had a perfect right to go from Bilbao to London and from London to Bremen and from Bremen to Liverpool in virtue of his powers of trading to those ports in any rotation. But a visit to a home port might also lawfully occur in virtue of the obligation that the crew have accepted to take the ship to such port, within home trading limits, as the master may require at the termination of the contract. I can see nothing which estops the master from saying that the visit to Southampton in this case was a visit during the currency of the contract, in virtue of his right of trading to ports in any rotation, or which requires us to assume that it was under the latter of the two powers, that is, that by which he would take the ship to a port within home trading limits for the purpose of terminating the service. If I might put it in a skeleton form, it appears to me that the contract says that the master must come to a port within home trading limits if he wishes to terminate the service. Counsel for the Board of Trade would have us invert that proposition and say the master must terminate the service if he wishes to come to a port within home trading limits. Those two propositions are widely different. The first appears to me to be correct, and for the second I can see no ground; and I am, therefore, of opinion that in his trading the master had full right to go to ports situated within the home trading limits, and that those rights were exactly the same as those which he possessed to go to ports outside the home trading limits in that trading.

Sir Robert Finlay, as counsel for the Board of Trade, evidently felt the difficulties of the contention which he was supporting much in the way that they suggested themselves to me, and accordingly, with a perfectly logical frankness, he admitted that the contention practically amounted to requesting the Court to read the words "other than ports within home trading limits" into the agreement, so that the agreement if expanded to express the full meaning would read as follows: "Proceeding thence to Malta, thereafter trading to ports—other than ports within home trading limits—in any rotation." If I could see my way to read those words into the agreement—by which I mean to take them as implied therein—I think the contention of the respondents would be right. The presence of the ship at a port within home trading limits would no longer be capable of bearing two interpretations. It could only lawfully occur in virtue of the power possessed by the master to require the crew to take the ship to a port within home trading limits for the purpose of terminating the contract. Consequently, by taking the ship to Southampton the master would have elected to terminate the contract of service there.

But I can see no ground for reading those words into the contract. It appears to me that they contradict and are inconsistent with the words "ports in any rotation," those ports having been previously defined by words which unquestionably include ports within home trading limits. Not only do I think that they are inconsistent with the agreement as it stands, but I can see no good sense or reason in implying them therein, because I can see no good reason why the parties to this agreement should wish to exclude ports within home trading limits from the trading rights which were intended to be given in this "tramp voyage." Why they should wish to exclude the power of going from Lisbon to Bremen and Bremen to Gibraltar, when they were going to give the power of going from Lisbon to Bordeaux and from Bordeaux to Gibraltar, I cannot see. Therefore I cannot assent to the contention that I ought to imply those words, and the contract must be construed as it stands.

What are the grounds on which counsel for the Board of Trade have asked us to construe this contract in a sense other than its natural sense? Two matters have been urged before us, and I have given them full consideration because I can see that they are both considered to be important by those very eminent counsel. The first, which seems to have weighed most heavily with the Solicitor-General, is that on the arrival at Southampton there was a total discharge of the cargo, and he contended that on the discharge of the cargo the voyage necessarily came to an end. In my opinion he has been misled by the use of the phrase "the cargo." This contract does not contemplate a single cargo, but a succession of cargoes, and just as it is agreed by all parties that the complete discharge of a cargo at Bilbao would not terminate the term of the agreement, so a complete discharge of the cargo at Southampton cannot necessarily have any such effect. So soon as it is realized that the agreement contemplates cargoes taken and discharged and fresh cargoes taken in, there is no more difficulty in coming to the conclusion that the contract was not at an end when that occurred at Southampton than there would be if it had occurred at any other place outside home trading limits.

The other point on which great weight was laid by counsel for the Board of Trade is that if this agreement is construed in the way contended for by counsel for the master of the *Scarsdale*, it amounts to a time agreement for a period of not more than one year, and that time agreements for seamen are not permitted by law, and, therefore, the agreement if so interpreted would be invalid.

On this point I have formed no opinion, and I intend, therefore, to express none. My reasons are as follows: In the first place I realize that the question whether time agreements other than the running agreements referred to in ss. 115 and 116 of the Merchant Shipping Act, 1894, are legal in the case of contracts for seamen's service may be a point of enormous importance both to the mercantile marine and to sailors, and, therefore, I should be loth to decide it excepting in a case where, by reason of its being necessary to the decision, it would certainly be argued fully. In the present case it is quite immaterial—it can produce no effect upon our decision. If this contract be illegal, and therefore void, the appellant would succeed in the present case, because there would be no contract upon which the magistrates could exercise jurisdiction, and if it be legal the appellant succeeds on the grounds I have stated above. But a further reason for not deciding this question is that, in my opinion, if the contract be illegal on the ground suggested with the one interpretation, it would equally be so with the other interpretation. The two interpretations do not differ in respect of whether the contract is for a period of time or not. They only differ in the latitude of choice of the trading ports at which the ship may call during the contract of service. This is seen if the contract in its present state is compared with the contract as altered by reading in the words contended for by counsel for the Board of Trade. They are both contracts for a period not exceeding a year; according to the one interpretation with full liberty to call at any ports in the world during that period, and in the other case to call at any ports outside home trading limits during that period; and the difficulty that has been referred to by counsel for the Board of Trade—viz., that the master would have the power of prolonging the service for any period within the year—would apply equally to the one as to the other.

In my opinion, therefore, both interpretations would make the contract good or would make the contract bad alike. The principle "ut res magis valeat quam pereat" has no application. I, therefore, express no opinion whatever as to whether time agreements other than the running agreements referred to in the statute are permissible, and I base my decision solely upon this fact—that in order to succeed the respondents must shew that there was a valid agreement which was terminated by a call at Southampton, whatever were the purposes for which that call was made. In my opinion they have failed to establish that, and, therefore, I am of opinion that the appeal should be allowed, with costs.

Appeal allowed.

Solicitors for the appellant (defendant), the master of the *Scarsdale: Botterell & Roche.*

Solicitor for the Board of Trade: *The Treasury Solicitor.*

Solicitors for the respondent (plaintiff), the fireman on board the *Scarsdale: Chivers & Co.*

T. L. M.

1906

Jan. 15, 29.

IN THE ESTATE OF A. M. CAUSTON.

Probate—Practice—Administration—Grant to Official Receiver in Bankruptcy—Sureties dispensed with.

In a case of a grant of administration to an official receiver in bankruptcy, who, as an official of the Board of Trade, had given security for the due performance of his duties, the Probate Court dispensed with sureties to the administration bond in the special circumstances of the case.

ALICE MAUD CAUSTON, late of Herne Lodge, Surbiton Hill Park, Surbiton, died on May 1, 1877, intestate, leaving Marcus Edward Causton, her husband, surviving. No administration to her estate had been hitherto applied for.

On November 18, 1887, Marcus Edward Causton was adjudicated a bankrupt.

The deceased was entitled to a legacy of 764*l.* 4*s.* 6*d.* (gross), which became payable on the death of a life-tenant in 1904. The bankruptcy of Marcus Edward Causton had never been closed, and his affairs remained in the hands of the trustee. Application was now made, under s. 73 of the Court of Probate Act, that a grant of letters of administration in respect of the estate of the said A. M. Causton be made to Edward Leadam Hough as an official receiver in bankruptcy and the trustee of the estate of the said bankrupt, and on January 15, 1906, Sir Gorell Barnes, President, made an order accordingly, directing the usual bond with sureties to be given.

The bankrupt had notice and consented.

Jan. 29, 1906. *R. H. Pritchard*, for the official receiver (the proposed administrator), renewed the application, asking now that sureties be dispensed with. The proposed administrator has already, by virtue of his official position, given security on his appointment under the Board of Trade. [He referred to the Bankruptcy Rules, 1886, r. 342 (1.) (2.) (3.). (1)]

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(1) Rule 342 of the Bankruptcy Rules, 1886, is as follows:—

"(1.) The security shall be given to such officers or persons and in such manner as the Board of Trade may from time to time direct.

"(2.) It shall not be necessary that security shall be given in each

This course was followed in the case of *In the Goods of Adams.* (1)

SIR GORELL BARNES, PRESIDENT, directed that security might be dispensed with, on the registrar being satisfied, by production, that such security had been given by the applicant to the Board of Trade in the manner stated and prescribed.

Solicitors: *C. J. Smith & Hudson.*

H. D. G.

EVANS *v.* EVANS AND ELFORD.

1906

Jan. 22; *Feb.* 22.

Divorce—Adulterous Petitioner—Discretion—Matrimonial Causes Act, 1857 (20 & 21 *Vict.* c. 85), s. 31—*Duty of Petitioner to place material Facts before the Court—Refusal of Decree.*

The interests of society and public morality are to be considered by the Court in exercising the discretion conferred by s. 31 of the Matrimonial Causes Act, 1857.

HUSBAND'S undefended petition for dissolution of marriage.

The facts, so far as material, are stated in the judgment.

Priestley, K.C., and *Cooper Wyld*, for the petitioner.

Cur. adv. vult.

Feb. 22. SIR GORELL BARNES, PRESIDENT. In this case the petitioner seeks to obtain a divorce from his wife on the ground of her alleged adultery with one Elford. The case came before me recently and was undefended, and the adultery of the respondent, which was alleged to have taken place in the early

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separate matter; but security may be given, either specially in a particular matter, or generally to be available for any matter in which the person giving security may be appointed either as trustee or special manager.

"(3.) The Board of Trade shall fix the amount and nature of such security, and may from time to time, as they think fit, either increase or diminish the amount of special or general security which any person has given."

(1) (1896) unreported; but see *In the Goods of Bryan*, [1905] P. 88.

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part of last year, was established; but a question of some importance to the petitioner was raised by his own conduct since his marriage.

The short facts which it is necessary to state in order to appreciate this point are as follows:—The petitioner was a butler in domestic service who was married to the respondent on September 28, 1887, and there was issue of the marriage two children. He lived with his wife up to the year 1892, and then appears to have had reason to complain of her drunken and dissipated habits, which led to a separation between them in that year. About that time he appears to have charged her with committing adultery with a relative, but she denied it, and he does not appear to have been certain upon the matter or to have had the evidence necessary to establish his charge.

After the separation he allowed her a sum of twelve shillings a week and furnished a home for her; but on several occasions she appears to have sold up the home in order to procure drink, and to have continued her drunken habits.

In the year 1902 he alleged that he heard that she had committed adultery with one Bono, and that he had discovered that she had also committed adultery with a man named Luke; and on July 31, 1902, he filed a petition in this Court to obtain a divorce from her on the ground of her adultery with those two men. The case was undefended, and the petition was heard on January 14, 1903, and a decree nisi was, on that date, obtained by him from the late President on the ground of the respondent's adultery with the co-respondent Luke.

Whether the case against her and Bono was not proved or was abandoned, or what happened with regard to it, I was not informed.

On June 5, 1903, the King's Proctor intervened, and by his plea alleged that the petitioner had frequently committed adultery with one Frances Sarah Stevens; that, in or about the month of January, 1894, he committed adultery with the said Stevens, and that on October 26, 1894, she was delivered of a child by him; that, in or about the month of July, 1899, he committed adultery with the said Stevens, and that on April 5, 1900, she was delivered of another child by him; and the King's Proctor prayed that the decree nisi might be rescinded and the petition dismissed with costs.

On June 25, 1903, the King's Proctor received an intimation from the petitioner's solicitors that they advised him not to take any further proceedings to have the decree nisi made absolute, and that, accordingly, he did not propose to proceed further in the matter.

On July 13, 1903, the late President rescinded the decree nisi, dismissed the petition, and condemned the petitioner in the costs of the King's Proctor. Those costs were afterwards paid by the petitioner.

At the time of obtaining the decree nisi the petitioner had not disclosed to the Court any of the facts upon which the King's Proctor's plea was based.

On September 23, 1905, the petitioner filed his petition in the present suit, and the case came before me as an undefended suit on January 22, 1906, when the adultery of the respondent with Elford in the early part of last year was proved. In the course of his evidence the petitioner was asked by his counsel with regard to the facts relating to the previous petition and the rescission of the decree nisi pronounced in 1903. He admitted that the plea of the King's Proctor was true, and, in answer to further questions, stated that the adultery with Stevens had taken place first in the year 1894; that she was a cook in the same service as himself; that his intercourse with her had continued for two years, and resulted in the birth of a child; that in the year 1899 his intercourse with her was resumed, and continued, according to my recollection, for about a year, and resulted in the birth of another child. He further stated that since the intervention of the King's Proctor there had been no further misconduct on his part; that his wife had not improved in her habits; and that in April of last year he discovered her adultery, which formed the basis of the present petition.

On these facts the petitioner prayed the Court to exercise its discretion in his favour under the 31st section of the Matrimonial Causes Act, 1857.

For the purposes of my decision, I assume his statements of the facts to be correct, though I have only heard his side of the story, and it is obvious that if he has concealed material facts once he is a person who might not tell all that has occurred now. However, I assume that he has disclosed the material facts now.

His counsel was unable to produce any case which could be relied on by him as an authority for the exercise of the discretion of the Court in favour of a petitioner under such circumstances as those disclosed in the present case: but he urged that the cases ought at the present day to be reconsidered, and that in those cases the discretion of the Court had been exercised with too great severity against petitioners; that the respondent had been guilty of misconduct conducing to the petitioner's adultery; that the petitioner had led a chaste life since his intercourse with Stevens had ceased; and that these matters ought to be taken into consideration as circumstances entitling him to have the Court exercise its discretion in his favour.

At the hearing of the case I felt no doubt as to how the discretion of the Court ought to be exercised in this case; but, having regard to counsel's observations on the previous cases in this Court, I desired to re-read them before giving my judgment. I have accordingly done so most carefully, and am satisfied that there is nothing to be found in any of the cases which have been decided since this Court came into existence in the year 1858 which would justify me in exercising my discretion in favour of the petitioner. Most of the cases are reviewed by the late Lord St. Helier in the case of *Symons* v. *Symons* (1), and I therefore do not propose to review them in detail.

As to the rules which guided the Ecclesiastical Courts before the Act of 1857, I may refer to the cases of *Proctor* v. *Proctor* (2) and *Anichini* v. *Anichini* (3), and others which are mentioned in the judgment of Lord St. Helier in *Constantinidi* v. *Constantinidi* (4); but when that Act was passed a discretion was given by the 31st section to the Divorce Court to grant a decree of divorce in favour of a petitioner, although the petitioner had been guilty of adultery. No guide is to be found in the Act as to how that discretion is to be exercised, but it seems probable that the section was intended to apply in cases of an exceptional character.

(1) [1897] P. 167.

(2) (1819) 2 Hagg. Con. 292.

(3) (1839) 2 Curt. 210.

(4) [1903] P. 246, 258.

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[See the judgments in *Lautour* v. *H. M. Proctor* (1) of the learned Lords who had taken part in the framing of the Act.] The cases which have been decided under the Act shew that the judges of this Court have not been lenient to petitioners in exercising a discretion in their favour: note, for instances, the cases of *Clarke* v. *Clarke* (2), before Lord Penzance, and *McCord* v. *McCord* (3), before Lord Hannen; but I do not propose to examine those and other cases in order to consider and criticize the exercise of discretion on the facts of each particular case. It is enough for my purpose to examine the grounds upon which my predecessors have acted. These were stated by Lord Penzance in the case of *Morgan* v. *Morgan and Porter* (4) as follows:—

"In cases where the adultery complained of has no special circumstances attending it, and no special features placing it in some category capable of distinct statement and recognition, there would, I think, be great mischief in this Court assuming to itself a right to grant or withhold a divorce upon the mere footing of the petitioner's adultery being under the whole circumstances of each case more or less pardonable or capable of excuse."

This passage from the judgment of Lord Penzance was approved by Lord Hannen in *McCord* v. *McCord* (3), by Sir Charles Butt in *Grosvenor* v. *Grosvenor* (5), and by Lord St. Helier in *Symons* v. *Symons* (6); and in my opinion it is based upon the principle to which I will refer later. So far as I am aware there has been no departure, in this Court, from these views with regard to the exercise of the Court's discretion. In the exceptional case of *Symons* v. *Symons* (6), already referred to, all that the decision of the late Lord St. Helier amounted to was that the circumstances to be considered by the Court in exercising its discretion in granting a divorce to a wife who had been guilty of adultery should include the case of a husband causing or conducing to adultery by his own wilful neglect or misconduct. Towards the close of his judgment the late President said: "On principle, there appears to me to be strong reason for holding that such wilful neglect or misconduct of a husband should constitute matters possibly not always conclusive, but fit to be taken into consideration in exercising the discretion whether a divorce should be granted or not."

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(1) (1864) 10 H. L. Cas. 685.

(2) (1865) 34 L. J. (P. & M.) 94.

(3) (1875) L. R. 3 P. & M. 237.

(4) (1869) L. R. 1 P. & M. 644.

(5) (1885) 34 W. R. 140.

(6) [1897] P. 167.

The same principle was applied by Lord St. Helier in *Constantinidi* v. *Constantinidi and Lance* (1), though in its application to the facts of that case the learned President seems to have gone somewhat beyond the principle which he himself adopted, and I think that the manner in which he applied that principle has met with disapproval in the Court of Appeal (2), where, the appeal against the decree nisi having been dropped for some reason with which I am not acquainted, and the matter having come before the Court on the question of varying the settlements, and Lord St. Helier having made an order varying the settlements, that order was reversed.

In the course of his judgment, Vaughan Williams L.J. expressed himself as follows (3):—"I will now deal with the principles which, in my opinion, ought to govern the exercise of the statutory power of varying marriage settlements in cases of divorce. First of all, it is to be remembered that in the exercise of the powers conferred by the Divorce Acts the Court must have regard not only to the rights and liabilities of the matrimonial person wronged and of the wrong-doer respectively inter se, but also to the interests of society and public morality, which generally require that the relief and benefits the Courts have the power of giving under those Acts shall scarcely be given to those who themselves have been guilty of matrimonial infidelity. There may be such palliation of matrimonial infidelity by a petitioner as that public morality will not be outraged by the exercise of judicial discretion in favour of such a petitioner. This is, I think, established by the case of *Symons* v. *Symons* (4), which is quoted by the learned President in his divorce judgment; but the fact that the petitioner has been so guilty must always be taken into consideration in the interests of public morality." And he further said (5): "I have already acquiesced in the correctness of the view of Sir F. Jeune that there may be circumstances in which the relief and benefits which the Court has power under these Acts of Parliament to confer may be conferred upon even a guilty party without outraging in any way public decency or public morality, and I refer to the case of *Symons* v. *Symons* (1), which I have already mentioned; but those cases must be very rare. I cannot myself see in the present case that the benefits intended to be conferred by the Legislature on husbands or wives, or, as in the present case, on the husband who has been wronged, can, having regard to his own conduct, be conferred upon him without seriously trenching upon the spirit of public morality which seems to me to run through these Acts of Parliament."

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(1) [1903] P. 246.
(2) [1905] P. 253.
(3) [1905] P. at p. 270.
(4) [1897] P. 167.
(5) [1905] P. at 274.

Stirling L.J. in the course of his judgment, said (2): "I should prefer myself to state the law in this way—that in the exercise of every discretion which is vested in the Court, the Court should endeavour to promote virtue and morality, and to discourage vice and immorality."

Cozens-Hardy L.J. used language much to the same effect.

It is important to notice in this connection that although the petitioner's conduct may give rise to a defence to a suit for divorce charging adultery, it does not follow that similar conduct on the part of the respondent will destroy a defence on the ground of the petitioner's adultery (see, upon an analogous point, 2 Curteis, p. 217). There is, in my opinion, a great difference between the two positions: in the one case the petitioner is seeking to obtain a decree, notwithstanding the fact that his or her conduct has conduced to the respondent's adultery; and, in the other, the petitioner, being guilty of the same offence as the respondent, is seeking to relieve himself or herself of the consequences of his or her own guilt. In the latter case, it must obviously be very rarely that the Court would be disposed to exercise its discretion in favour of the petitioner, and I am not aware of any case in which this has been done except the two cases, above referred to, of *Symons* v. *Symons* (1), and the questionable case of *Constantinidi* v. *Constantinidi*. (3)

This Court, in divorce cases, is dealing with a subject-matter

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(1) [1897] P. 167.
(2) [1905] P. at p. 278.
(3) [1903] P. 246.

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of great gravity. Its decrees affect not merely the parties to the suit, but their children, if any, and indirectly their relatives, and the social circle in which they live: and also society in general, is concerned. For this reason any one of the public, or the King's Proctor as representing the public, may intervene to prevent divorces from being improperly obtained. The Court is not bound to pronounce a decree of divorce if the petitioner has been guilty of any one or more of the matters mentioned in the proviso to the 31st section of the Act of 1857, one of which is adultery on the part of the petitioner.

The guiding principle to be followed by the Court in the exercise of its discretion cannot, in my opinion, be better expressed than in the words, above referred to, used by Vaughan Williams L.J.: "The Court must have regard not only to the rights and liabilities of the matrimonial person wronged and of the wrong-doer respectively, but also to the interests of society and public morality." It is, in my opinion, this principle which is to be found running through the decisions and dicta of the judges who have sat in this Court for the last fifty years, though they have, perhaps, not expressed themselves in such general terms, but in the manner stated in the passage quoted above from Lord Penzance's judgment giving practical rules for the application of the principle; and though, in some instances, they may have exercised their discretion somewhat strongly against the petitioners.

In the present case the respondent, according to the petitioner's case, has been a drunken and immoral woman, but he himself has been guilty of gross immorality. After he separated from his wife, he debauched his fellow-servant—a serious offence in a household, especially having regard to the risks and temptations to which female servants are exposed owing to the necessary continued proximity in which they are placed with others. It is an offence which may have disastrous consequences to the woman, both as regards character and employment. His intercourse with her extended over a lengthy period, and resulted in the birth of two illegitimate children. He now says this was caused by his wife's misconduct. How this can really be so I fail to see. It is true that the cause of the separation was,

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according to his account, his wife's conduct; but how can this justify his own immorality? Separation between husband and wife may arise through many causes, some of which may be put down to the conduct of one of the parties—for example, wilful separation, drunkenness, immorality, violence of temper, &c.; and others not—for example, separation for reasons of health, business or professional purposes, insanity, &c. But is it to be said that in every case the husband or wife, as the case may be, is to be at liberty to commit adultery, and that if he or she is in a position to prove adultery against the other party to the marriage his or her own adultery is to be excused if the separation is due to the conduct of the other? This idea was repudiated by Sir Cresswell Cresswell in *Latour* v. *Latour and Weston* (1) and by Lord St. Helier in *Synge* v. *Synge*. (2)

The petitioner's counsel further urged that the petitioner had lived a chaste life latterly, and that it would be unreasonable to hold the petitioner and respondent bound for the rest of their lives by the tie of marriage. There is little weight to be attached to the first branch of this argument. To accede to it, after such conduct as the petitioner's, would be practically to sanction adultery on the part of every petitioner provided that he could shew that for some short period before the hearing he had lived properly. With regard to the latter branch of the argument, it is sufficient to observe that for centuries marriage in England was indissoluble except by Act of Parliament; and when the Act of 1857 gave a right to sue in this Court, that right, as I have already noticed, was restricted by the provision (inter alia) that the Court should not be bound to pronounce a decree if the petitioner were guilty of an offence specified in the proviso to the 31st section: so that, although in some systems of jurisprudence it may be considered inexpedient to hold persons bound by the marriage tie when both have been guilty of adultery (see Traité Pratique du Divorce, par Goirand, 3me ed. pp. 4, 181), that is not the position adopted in the Law of England, which has to be administered in this Court.

Although, therefore, it may be to the interest of the petitioner to accede to his application in this case, in my judgment it would

(1) (1861) 2 Sw. & Tr. 524, 529.

(2) [1900] P. 180, 207.

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not be in the interests of society and public morality and purity to do so, and there are no special circumstances in the case which would justify me in doing so. I, therefore, exercise my discretion by refusing the petitioner a decree, and I dismiss the petition.

I desire to notice with regret, although it does not affect the petitioner's rights in this case, that the proceedings in the former suit shew that the petitioner concealed his conduct from the Court at the time of the first decree nisi; and it was only through the vigilance of the King's Proctor that he was prevented from obtaining a decree absolute then. It is much to be regretted that petitioners are to be found who are willing to practise on the Court this form of concealment, hoping that the fraud will not be discovered in time to prevent them from obtaining a decree absolute. It cannot be too emphatically stated that it is the duty of a petitioner to place all the material facts before the Court, and that if he or she fail to do so a fraud upon the Court is committed which is hardly sufficiently punished by the dismissal of the petition if the true facts are brought to the attention of the Court in time. In my opinion it is desirable that some amendment in the rules of practice of the Court, beyond the provisions which exist, should be made, to further assist the Court in preventing this evil; but, under the Acts as they at present stand, there are difficulties in carrying this out.

Solicitors: *Kingsbury & Turner.*

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ARMITAGE *v.* THE ATTORNEY-GENERAL (GILLIG CITED). GILLIG *v.* GILLIG.

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Feb. 20, 21.

Legitimacy Declaration Act, 1858 (21 *&* 22 *Vict.* c. 93)—*Foreign Domicil—Divorce in another State—Recognition by Law of Domicil—Effect—English Law.*

The Courts of this country will recognize the binding effect of a decree of divorce obtained in a State where the husband was not domiciled, if the Courts of the country or State of his domicil would recognize the validity of the decree.

G., an American citizen temporarily resident and carrying on business in England, but who never abandoned his domicil of origin in the State of New York, married an Englishwoman in England. She afterwards instituted proceedings under the Guardianship of Infants Act, 1886, which were compromised by a deed of separation. Some years later she instituted, in the State of South Dakota, proceedings for a divorce, to which he put in an answer and cross-claim, the latter being dismissed, and a decree being pronounced on the wife's petition, upon a ground which would not constitute a ground for dissolving the marriage either in the Courts of the husband's domicil or in this country.

Upon evidence which satisfied this Court that the Courts of the husband's domicil would recognize a decree so obtained:—

Held, that the South Dakota decree of divorce must be recognized as a valid dissolution of the marriage, and that the subsequent marriages of the respective spouses were consequently valid.

THIS was a petition by Mrs. Amy Armitage praying for a declaration as to the validity of her marriage with Edward Armitage.

The application was made under the Legitimacy Declaration Act, 1858 (21 & 22 Vict. c. 93), the 1st section of which, so far as material to the present case, is as follows:—

"Any natural-born subject of the Queen, or any person whose right to be deemed a natural-born subject depends wholly or in part on his (her) legitimacy or on the validity of a marriage, being domiciled in England . . . . may apply by petition to the Court for Divorce and Matrimonial Causes praying the Court . . . . for a decree declaring that his (her) marriage was or is a valid marriage; and such Court shall have jurisdiction to hear and determine such application, and to make such decree, declaratory . . . . of the validity or invalidity of such marriage, as to the Court may seem just; and such decree, except as hereinafter mentioned, shall be binding to all intents and purposes on Her Majesty and on all persons whomsoever."

The Act (s. 6) requires that the Attorney-General shall be a respondent, and it also contains provisions (s. 7) for enabling other persons to be cited to see proceedings.

The case involved matters of fact and of law, both more or less complicated. The Attorney-General, by his answer, did not admit the allegations of fact in the petition, while C. A. Gillig, who was cited, traversed most of the allegations, and both answers prayed the Court to reject the prayer of the petition.

The petitioner was the daughter of a gentleman in Cambridgeshire, a natural-born subject of the Queen. On January 10, 1883, being then only eighteen years of age, she was married at Milton, Cambridgeshire, to Charles Alvin Gillig, a domiciled citizen of the United States of America, who was born in New York, and was at the time of the marriage and of the subsequent divorce proceedings temporarily resident in England.

According to the evidence, his domicil of origin was in the State of New York, and there was nothing to shew that he changed that domicil. He was engaged in business wholly connected with America or Americans. He spent about half of his time in America, and the inference drawn from the facts proved was that, at all times material to this case, he was and remained an American citizen, domiciled in the State of New York.

The petitioner's marriage with Gillig was not productive of happiness, and on August 12, 1887, a deed of separation, in common form, was entered into, and among other provisions was one for the petitioner to have the custody of the two children of that marriage, a boy and a girl. There had been some proceedings, instituted in the Chancery Division by the petitioner under the Guardianship of Infants Act, 1886, which led up to the deed of separation being entered into. Shortly after that the petitioner made up her mind to proceed to America, and it was clear that she decided to leave England altogether. She had a little money, namely, the interest of some 2000*l.*, and an allowance from her mother.

She left this country in the spring of 1891, having previously undergone a course of training, lasting about a year, and taken diplomas as a teacher at the National School of Cookery here.

She finally determined to break with this country and to restart her life in America. In proceeding thither she had in her mind the idea that she might take proceedings there for a divorce from her husband, Mr. Gillig; but she had absolutely determined to quit this country and to establish herself in America.

She proceeded to Yankton, in the State of South Dakota, and one of her objects in doing so was to institute proceedings there for divorce.

She acquired a domicil there in a sense which is recognized in America, but is foreign to our notions in this country. According to the evidence of Mr. John Arthur Barratt, if a woman is separated from her husband under circumstances which would have given her a cause of action against him she may acquire a separate domicil.

Having settled in Yankton, the petitioner instituted, a little more than three months afterwards, in the Circuit Court there, proceedings for divorce against her husband, Mr. Gillig.

Those proceedings were served upon him in England, as proved by the witness who personally served him on August 18, 1891.

He might have left those proceedings unnoticed, but he did not do so. Neither did he content himself with entering an appearance under protest and challenging the jurisdiction. But he lodged in the Court at Yankton an answer, in the form of an affidavit sworn in London at the Consulate-General of the United States on September 1, 1891, wherein, after admitting his marriage to the petitioner, he stated, in paragraph 2: "That I am a native-born citizen of the United States of America, temporarily residing and doing business as president of the United States Exchange at No. 9, Strand, London, England"; and, after dealing with a number of matters, he wound up his answer with a counter-claim as follows: "And now, having fully answered the said petition and the matters therein charged and set forth, defendant begs and prays, as a matter of natural justice, that he be freed and relieved from

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the plaintiff in this action, and that a decree of divorce be entered by which defendant is relieved and released from every and all responsibility as a husband and is vindicated as an honourable American citizen, who in this action is most wrongfully, unlawfully, cruelly, and brutally charged."

He appears to have exhibited to his answer, among other documents, the separation deed dated August 12, 1887.

The case was heard at Yankton, South Dakota, in November, 1891, and on the 23rd of that month the Court there gave its decision. A certified copy of the judgment roll was put in, from which the following findings of fact appeared :—

"This cause having come on regularly for trial, and the Court finding that notice of trial was duly served upon the defendant herein: upon the complaint and answer herein filed before the Court, a jury therein having been waived, and after hearing the evidence offered on the part of the plaintiff, the defendant not appearing"—i.e., at the hearing—"and the Court being fully advised in the premises, now finds the following facts" :—

"That Amy Gillig and the defendant Charles A. Gillig were married one with the other at Milton, near Cambridge, England, on the 10th day of January, 1883, and that they ever since have been and still are husband and wife.

"That for more than ninety days and upwards prior to and immediately preceding the commencement of this action the plaintiff was and still is an actual and bona fide resident of the State of South Dakota.

"That since the marriage the defendant has treated the plaintiff in a cruel and inhuman manner . . . ." [instances given].

"That in the spring of 1884 plaintiff was compelled, on account of ill-health, caused by the ill-treatment of defendant, to return to her former home . . . . and place herself under the care of a doctor. . . . ."

With regard to the counter charges, the Court found "that such charges were wholly false and without any foundation whatever in fact, and that the defendant well knew at the time of making them that they were false; that he afterwards, in writing, voluntarily withdrew such charges; that, notwithstanding the defendant had withdrawn these charges in writing, he again in his answer in this case, sworn to by defendant, reiterates said charges."

"That during nearly the whole time that plaintiff lived with defendant he failed to properly support or clothe plaintiff and subjected her at all times to abuse and fits of anger, making all kinds of charges against plaintiff; that this was continued to such an extent that to have lived longer with defendant would have seriously endangered her health and her life; and, because of such treatment and acts done by the defendant, the plaintiff was compelled to and did, under advice of her physician and parents, leave the said defendant on or about the 1st day of January, 1887, since which time plaintiff and defendant have never lived or cohabited together as husband and wife."

"As conclusions of law on the foregoing facts, the Court finds:—

"1. That the plaintiff is entitled to a decree of this Court, dissolving the bonds of matrimony heretofore existing between plaintiff and defendant, decreeing the plaintiff and defendant each to be freed and absolutely released from the bonds of matrimony and obligations thereof.

"2. That said acts found from the evidence as done and performed by defendant amount to desertion on the part of the defendant; that the said desertion has continued for two years and upwards last past.

"3. That the plaintiff, Amy Gillig, is entitled to the sole charge, control, and custody of the children, the issue of said marriage."

The ground, therefore, was desertion, although the formal decree dissolving the marriage recited that "all the material allegations of the complaint are true and sustained by the testimony submitted on the part of the plaintiff, and that said matters so alleged and proved in behalf of the plaintiff are sufficient in law to entitle the plaintiff to the relief prayed for in her complaint."

Duke, K.C., and *Durley Grazebrook*, for the petitioner.

Graham Campbell, for the Attorney-General.

Boxall, K.C., and *R. Steven*, for C. A. Gillig, party cited (and for the same, as petitioner in the nullity suit).

SIR GORELL BARNES, PRESIDENT, after stating the foregoing facts, proceeded as follows:—It is not for me, sitting here, to investigate whether the finding of desertion is consistent with a deed of separation having been executed, or to consider whether this Court would have found the facts in the same way. It is sufficient that that was a finding between the parties which justified a decree; and I have to determine whether that is such a decree as should be recognized in this country. The importance of this question is extremely great, because the plaintiff in that case married Mr. Armitage on June 30, 1892, at Denver, Colorado. They have lived together ever since, and there are four children issue of that marriage. Mr. Armitage is an English gentleman, always domiciled in England, and if the marriage between the lady and Gillig was not dissolved, she was, of course, not free to contract the fresh marriage.

But it does not rest there, for in the year 1899 Gillig went through the ceremony of marriage with a widow named Carrie Alta Osgood, and in the register of that marriage he is described as "the divorced husband of Amy Gillig." On March 13, 1905, Gillig filed a petition for nullity, on the ground that at the time he went through the ceremony of marriage with Mrs. Osgood his former wife was still alive and the marriage with her still subsisted. That case, like the present one, must depend on whether the decree of divorce was valid or invalid. I have not to consider, except in connection with one point which I will deal with hereafter, the effect of the divorce proceedings according to English law.

Mr. Gillig, being domiciled in the State of New York, was served in England, and entered an action by cross-claim. In a sense, therefore, he submitted to the jurisdiction of the Dakota Court. But, according to the view which we entertain here, that action by him would have been absolutely nugatory unless the Court in Dakota had jurisdiction. There is a passage in Mr. Dicey's book on domicil, where a contrary view is expressed, and where he appears to think that a party, by appearing and pleading, may give the Court jurisdiction (Dicey on Domicil, ed. 1879, p. 233). That, I think, is not in accordance with the law of this country. In fact, I myself have so held, and I dismissed a suit some years ago on the petitioner's own evidence.

This view of ours, however, does not appear to prevail in the United States of America, and I have only to find the foreign law, as a fact, upon the evidence given before me by the experts Mr. Barratt and Mr. Hendry. By the light of their testimony I have reached this point, that the law of the State of New York would, in this case, recognize the validity of the decree of the Court of South Dakota as binding both on Gillig and the present petitioner, and would do so notwithstanding the fact that, in the State of the husband's domicil (New York), the ground for divorce is not the same as in South Dakota.

The only question that remains for consideration is this question of English law: Are we to recognize in this country the binding effect of a decree obtained in a State in which the husband is not domiciled if the Courts of the State in which he is domiciled recognize the validity of that decree? This point has not been distinctly determined in the Courts of this country. The nearest decision is to be found in the somewhat analogous case of *Harvey* v. *Farnie* (1), in which it was held "that the English Courts will recognize as valid the decision of a competent foreign Christian tribunal dissolving the marriage between a domiciled native in the country where such tribunal has jurisdiction, and an Englishwoman, when the decree of divorce is not impeached by any species of collusion or fraud. And this, although the marriage may have been solemnized in England, and may have been dissolved for a cause which would not have been sufficient to obtain a divorce in England."

The evidence, in the present case, shows that in the State of New York the decision of the Court of South Dakota would be recognized as valid. The point then is: Are we in this country to recognize the validity of a divorce which is recognized as valid by the law of the domicil? In my view, this question must be answered in the affirmative. It seems to me impossible to come to any other conclusion, because the status is affected and determined by the decree that is recognized in the State of New York—the State of the domicil—as having affected and determined it.

That being so, Gillig and his former wife, the present petitioner, have ceased to be husband and wife in the place where they were domiciled at the date of the decree. It seems to me logically to follow that this Court must recognize that state of dissolved

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(1) (1882) 8 App. Cas. 43.

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union—dissolved, that is, in one State and recognized as dissolved in the other State—and that it must be recognized as dissolved all over the world. I, therefore, make a decree in terms of the prayer of this petition.

Upon the application of counsel for the petitioner, C. A. Gillig was condemned in the costs of the petitioner.

The Attorney-General did not ask for any order as to costs.

Solicitors for the petitioner: *Bilbrough & Plaskitts.*

Solicitor for C. A. Gillig (a party cited): *Thomas Durant.*

Solicitor for the Attorney-General: *The Treasury Solicitor.*

H. D. G.

1906
March 19, 22.

HODGSON ROBERTS *v.* HODGSON ROBERTS AND WHITAKER.

Divorce—Variation of Settlements—Power of Appointment in Favour of Petitioner's Second Wife and Children of Second Marriage—Interest of Child of dissolved Marriage—Matrimonial Causes Act, 1859 (22 *&* 23 *Vict. c.* 61), *s.* 5.

The main object and intent of the Legislature in giving the Divorce Court power to vary marriage settlements is to place the parties in the same position, as far as possible, as if the marriage had not been put an end to through the fault of one of them.

Where, upon a marriage which had been dissolved, power had been given to the innocent party, if survivor, by the terms of the marriage settlement to appoint a portion of the settled fund in favour of a future spouse and the children by any future marriage, the Court, in varying such a settlement, may, although issue of the dissolved marriage survive, permit such power to be exercised in the lifetime of the guilty party, to an extent, having due regard to all the facts, not detrimental to the interests of such issue.

VARIATION of settlements.

By decree absolute, dated September 14, 1904, the marriage was dissolved by reason of the respondent's adultery with the co-respondent.

There was one child of the marriage.

The petitioner (husband) had settled 40,000*l.* and the respondent (wife) had settled 10,000.

Outside the settlement the petitioner was possessed of or entitled to other property, including a reversionary interest, amounting to between 20,000*l.* and 30,000*l.*

The settlement gave him power, if he should survive the respondent, to appoint (in the event of there being only one child) two-thirds of the fund settled by him in favour of a future wife and the issue of a future marriage. On this point (the only one calling for report) the petitioner asked that the wife's interest in his settled fund should be extinguished as if she were now dead, and the registrar, in his report, recommended that this prayer should be acceded to.

Bayford, for the petitioner.

Le Bas, for the respondent.

H. Greenwood, for the trustees of the settlement and the infant child of the dissolved marriage, who opposed the report of the registrar, which, if confirmed, would have the effect of enabling the petitioner to appoint two-thirds of his settled fund in favour of a second wife and the child or children of a second marriage.

[The following cases were referred to in the course of the discussion :—*Benyon* v. *Benyon* (1) ; *Whitton* v. *Whitton* (2) ; *Blood* v. *Blood* (3) ; *Pollard* v. *Pollard.* (4)]

Cur. adv. vult.

March 22. SIR GORELL BARNES, PRESIDENT. The question whether the Court has power to do what is now asked by the petitioner and recommended by the report of the registrar has already been considered and dealt with by the late President in the case of *Whitton* v. *Whitton* (5), the headnote to the report of which sets out in substance what was decided. In the early part of the judgment he said : "I am clear that I have jurisdiction . . . . and I think no case has ever thrown doubt on that ; the case of *Pollard* v. *Pollard* (4) certainly does not throw doubt on the jurisdiction. But one has in these cases to consider what is really for the benefit of the children, because I think the authorities shew that nothing must be done that, on the whole, would be for the

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(1) (1876) 1 P. D. 447.

(2) [1901] P. 348

(3) [1902] P. 78, 190.

(4) [1894] P. 172.

(5) [1901] P. 348, 353.

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disadvantage of the children." It is not without interest to note that the petitioner in that case was said to be entitled to property in reversion, amounting in value to about 30,000*l*. In the present case the husband's property and reversionary interest outside the settlement amounts to nearer 30,000*l*. than 20,000*l*., and consists, inter alia, of cash investments about 4000*l*., a freehold house worth about 800*l*. per annum, and a reversionary interest, dependent on the life of a relative now aged about fifty-five, which will amount to about 14,000*l*. or 15,000*l*.

The question is whether the petitioner should be permitted to exercise the power of appointment to the full extent of the two-thirds of his settled fund, notwithstanding the fact that the respondent is still living, or whether while she is still living that power of the petitioner should be curtailed, and, if so, to what extent.

I have come to the conclusion that in this class of case there should be given to a petitioner power to exercise such power partially during the lifetime of the respondent. The dissolution of the marriage puts an end to the prospect of there being any further issue of that marriage.

The petitioner in this case is forty years of age, and the respondent thirty-five, and if the marriage tie had continued there would have been the possibility of further children being born as the result of that union.

If the marriage had been dissolved by the respondent's death, the power to appoint the settled fund to the extent of two-thirds would have at once become effective. The main object and intent of the Court in dealing with these matters is to place the parties in the same position as if the marriage had not been put an end to through the fault of one of them. In either of the two possible events I have indicated the interest of the existing child of the marriage might well have been less than it is now.

Where a younger life or lives is or are obliterated from consideration, and the settled funds are cleared of that life or lives, it is not unreasonable that some benefit should be conferred on the innocent parent, which would not be a substantial detriment to the child, and is the more reasonable from the fact of the petitioner being comparatively a young man.

On the other hand, the extent to which the petitioner asks

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to be allowed to retain this power is, to my mind, too great, and, giving my best consideration to the matter, I have come to the conclusion that the petitioner should be allowed to exercise the power during the lifetime of the respondent to the extent of one-third only of his settled fund.

Solicitors for petitioner: *Morgan, Price & Mewburn.*

Solicitors for respondent: *Rooper & Whately.*

Solicitors for trustees and child: *Van Sommer & Elers.*

H. D. G.

THE LOUISA.

1906
March 5

Admiralty—Salvage—Derelict—Award of total Proceeds.

A derelict barque, dismasted and on fire, was towed by a tug some twenty miles into Harwich, where the salvors succeeded in extinguishing the fire and placing the barque in safety The vessel and her cargo were ultimately sold by the Court, realizing 255*l.*, less 108*l.* expenses of the marshal. There was also a liability of 88*l.* for the assistance rendered to the salvors by others after the vessel was brought in, and a further liability of 21*l.* 17*s.* 9*d.* for dock dues, reducing the net balance to 37*l.* 2*s.* 3*d.*

In an action against the owners of the barque, her cargo and freight, the plaintiffs, the owner, master and crew of the tug, claimed salvage remuneration, and, judgment having been allowed to go by default, the Court awarded the total proceeds without a reference.

MOTION for judgment in an action of salvage by default.

The plaintiffs were the owner, master, and crew of the tug *Dauntless.* The defendants were the owners of the barque *Louisa,* her cargo and freight.

The facts were shortly as follows:—

On the evening of August 1, 1905, the British steel screw steam-tug *Dauntless*—109 tons gross register, 90 horse-power nominal, working up to 650 actual, with seven hands, and valued at 6500*l.*—was lying in Harwich harbour, with steam up, when those in charge received information that a vessel was in distress in the neighbourhood of the Gabbards. The tug proceeded for some twenty miles in a south-easterly direction, and came up, about midnight, with the barque *Louisa,* abandoned by her crew and on fire, with her masts and rigging hanging over the side. There was a fresh south-westerly breeze and some sea. The *Dauntless* having lowered a boat, and, with difficulty, made a wire hawser fast, proceeded to tow the vessel towards Harwich, which was reached about 8.30 P.M. on August 2. By permission of the guardship the derelict was moored for the night to the Government buoy, and an effort was made to extinguish the fire by pumping water into the vessel, which was ultimately successful, after she had, the next day, been placed on the mud, the *Dauntless* standing by until August 5.

The *Louisa*, with her cargo, consisting of general goods, was appraised and sold by the marshal under an order of the Court, and realized 255*l.*, less the expenses of the marshal, amounting to 108*l.* There was also a liability of 88*l.* for assistance rendered by another tug and by some fishermen, and 21*l.* 17*s.* 9*d.* owing for dock dues at Harwich, leaving a balance of 37*l.* 2*s.* 3*d.*

A. E. Nelson, for the plaintiffs, asked for payment out of the proceeds in Court by way of salvage remuneration.

BARGRAVE DEANE J. gave judgment in favour of the plaintiffs for the proceeds in Court without a reference. (1)

Solicitors for plaintiffs: *Lowless & Co.*

T. L. M.

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(1) Cases of the absorption of the whole proceeds in favour of salvors are rare, two-thirds being the maximum in the case of a derelict: see per Lord Stowell in *The Jubilee*, (1826) 3 Hagg. 45 *n.*; but in *The Boiler ex Elephant*, [1891] W. N. 52, a derelict marine boiler, part of the cargo of a vessel which had foundered at sea, realized on sale 58*l.* 3*s.* 4*d.* No one appeared to defend the action in rem brought by the salvors, who were awarded 50*l.* and costs. In the case of *The Arthur* (1901 G. No. 43), *Shipping Gazette*, May 2, 1901, a dismasted schooner of 102 tons, with a cargo of timber, was towed derelict out of the North Sea into an English port by two steam trawlers. At the hearing the owners of the schooner did not appear; but the owners of the cargo were represented, and, from the papers in the registry, it appeared that the net proceeds of the vessel after sale by the Court were 146*l.* 6*s.* 1*d.*, and of the cargo 1077*l.* 13*s.* 4*d.* From these sums the Court deducted the expenses paid by the salvors, which reduced the amounts to 109*l.* 8*s.* 2*d.* and 836*l.* 15*s.* 10*d.*, making together 946*l.* 4*s.*, and out of this sum awarded the two salvors 600*l.* In *The Georg*, [1894] P. 330, the awards to salvors, based on the appraised value, more than absorbed the whole proceeds of the subsequent sale of ship and cargo.—T. L. M.

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June 27, 28 ;
July 3.

Admiralty—Collision—Steam Trawler and Sailing Vessel—Lights—Regulations for Preventing Collisions at Sea, 1897, *Arts.* 2, 9, 20.

A British steam trawler of upwards of twenty tons gross register, fishing in the sea off the coast of Europe lying north of Cape Finisterre, and carrying the alternative lights prescribed by art. 9 of the Regulations for Preventing Collisions at Sea, as amended by Orders in Council, is, after getting in her trawl, so as to be no longer incumbered, but able to manœuvre, to be treated as a steam vessel under command, and, therefore, she is bound at night to exhibit the lights for a steam vessel prescribed by art. 2, and must, under art. 20, keep out of the way of a sailing vessel.

The Tweedsdale, (1889) 14 P. D. 164, followed.

Action of damage by collision.

The plaintiff was the owner of the ketch *Rival.* The defendants were the owners of the steam trawler *Upton Castle.*

The case is reported on the question of the duty of a steam trawler, after getting in her trawl, to comply with the ordinary regulations applicable to a steam vessel under way.

On February 25, 1905, about 9.30 p.m., the British wooden ketch *Rival*—of 110 tons gross register, four hands, with a cargo of scrap iron, from Southampton for Briton Ferry—was in the Bristol Channel about ten miles N.E. by N. of Trevose Head, on the north coast of Devonshire. The weather was fine and clear, with a strong south-westerly breeze, and the tide was about three-quarters flood of the force of about one and a half knots. The *Rival,* under two jibs, foresail, mainsail, gaff and mizzen topsail, was sailing free on a course of N.E. by E. making between five and six knots, when those in charge observed about one and a half miles distant, and about three points on the port bow, the lights of a vessel which proved to be those of the steam trawler *Upton Castle,* a steel screw ketch of 145 tons, 106 feet in length, with engines of fifty-five registered horse-power, a crew of nine hands, and carrying the regulation lights for a steam vessel of over twenty tons register engaged in trawling. (1) The collision between the

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(1) Art. 9 of the Regulations for Preventing Collisions at Sea, 1897, has not yet been promulgated. In the meantime, art. 10 of the Regulations of 1884 remains in force, as amended by Orders in Council of

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two vessels—according to the finding of the learned judge, assisted by two of the Elder Brethren of the Trinity House—occurred owing to the negligence of those in charge of the *Upton Castle*, which vessel, after getting in her trawl, and with her fishing lights still up—instead of the lights prescribed by art. 2 of the Regulations for Preventing Collisions at Sea for a steamer under way—steamed ahead across the bows of the *Rival*, when she ought to have kept out of the way of that sailing vessel under art. 20 of the same regulations.

June 27, 28. *R. H. Balloch*, for plaintiff, owner of the *Rival*. Those in charge of the *Upton Castle* had finished hauling in their gear some considerable time before the collision, and, therefore, they should have exhibited, under art. 2, the ordinary lights for a steam vessel under way, and, under art. 20, have got out of the way of the sailing vessel.

Lewis Noad, for defendants, owners of the *Upton Castle*. The sailing vessel should have kept out of the way of the trawler in accordance with the decision in *The Tweedsdale* (1), as, at the material time, the *Upton Castle* was lying dead in the water taking her trawl on board, and, therefore, was exhibiting the proper lights under art. 9 of the Regulations for Preventing Collisions at Sea. The order to go ahead was given at the last moment, in order, if possible, to avoid the collision. The law does not imply any such obligation as alleged on behalf of the plaintiff in respect of the trawler shifting her lights, and such an obligation, even if it existed, could not be carried out.

July 3. BARGRAVE DEANE J. It is difficult to reconcile the account of this collision as given on the one side and on the other. According to the master of the ketch *Rival*, he was on deck, with one hand at the tiller. The other two hands were below; and the hand at the tiller was a Swede, and was unable to give much information. The master says that somewhere about nine o'clock he was on a course of N.E. by E., when he

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December 30, 1884 (set out in *The Tweedsdale*, 14 P. D. 164, note), and June 24, 1885: see *The Orion*, [1891] P. 307, note on p. 308. The nature of the lights required by the regulations is set out in the judgment below.

(1) 14 P. D. 164.

saw two white lights ahead of him, and they were three points on his port bow. He did not know what they were, and after a little time, as the lights got nearer, he told the man at the tiller to starboard, and he starboarded sufficiently to bring those lights about a point on his starboard bow. He says he continued to watch them, and the lights got on to his starboard beam. He says that then he saw that one light was on the bridge of the other vessel. That is his story, and he says: "I kept on my course, and the other vessel, the steam trawler, steamed ahead right across my bows, and before I could do anything I was hit."

The story told by the trawler, the *Upton Castle*, is this: "We were fishing that night, and we had a buoy out and were fishing round that buoy, and at one time our head was N.W., but before the collision we brought it to E.N.E."—practically the same heading as the ketch. That would account for the ketch seeing two white lights. The trawler was hauling in her trawl, and therefore she was practically not moving, and she was keeping, I suppose, practically the same heading. So far nothing happened, but we have to consider what was going on on board the trawler. All hands were employed hauling in the trawl except the master, who was on the bridge, and we have no doubt the master was fully engaged, as the rest of the crew were, in the excitement as to what the trawl was bringing up. Apparently just before the collision the net had been got in, and then, the net being on board, the master set his engines ahead and he himself took the wheel. We know that the engines were going ahead for about a minute before the collision. We have the evidence of the master and the chief engineer, and we know that the full speed of the trawler was seven to eight knots. The question arises, Why did not the trawler see the ketch sooner? As far as I can judge nobody on board the trawler was keeping a look-out. The master was on the bridge, it is true, but he never saw the ketch, although the ketch must have been in sight for about half an hour. He did not see her, and the obvious remark to make is that it is quite clear there was in fact nobody keeping a look-out on the trawler. The master, as soon as the trawl was on board, as I have said, put the engines ahead and went to the wheel, and he then says he saw that the green light of the ketch was visible on his port side, heading straight for him. That proves, as a matter of fact, that the trawler had gone ahead crossing the bows of the ketch, and that when he ported his helm he ported it too late to avoid the collision. The obvious remark to make is: Why did not the master see this ketch sooner, and why did he put his engines full speed ahead, if he saw the ketch at a time when he would probably have avoided the collision if he had not put his engines ahead? My finding of fact is this, that there was not a proper look-out kept on the trawler, that those on the ketch did keep a proper look-out, and that they did nothing to bring about the collision, and avoided doing anything which would bring it about. Something has been said about the look-out on the ketch. The Elder Brethren of the Trinity House who are assisting me agree with me in thinking that the master of the ketch was in the best possible position for looking out. Where he was he could see under the sail, and he could also see over the rail on his starboard side, and so could see all round. I think he was in the proper place. I, therefore, find as a fact that the ketch is not to blame, and that owing to want of proper look-out on the trawler those in charge at the time did what was a wrong manœuvre in going ahead without first looking all round to see if there was anything in her way.

Now comes the question of law, and as it has been suggested that the trawler was not to blame in consequence of the view expressed by Sir Charles Butt in the case of *The Tweedsdale* (1), I have very carefully considered that case. The decision is this: There are in the light section of the sailing rules alternative lights provided for trawling vessels. They may either carry the ordinary lights for a steamship—that is, a red light on the port side, a green light on the starboard side, and a masthead light—or they may carry what some of the witnesses have called a duplex light—one lamp hoisted up to the masthead and shewing a white light forward, a red light on the port side, a green light on the starboard side, and with a dark arc aft. She has to carry these alternative lights when she is fishing instead of side-lights, and undoubtedly the decision in

(1) 14 P. D. 164.

The Tweedsdale (1) comes to this, that when a vessel is trawling, and therefore not under proper command, she ought to shew those lights to indicate to other vessels that she is not under command but is trawling, and that therefore it would be the duty of the other vessels to keep out of her way. In this case the lights carried by the *Upton Castle* were the alternative lights—the lamp of three colours and no side-lights—but at the time when this trawler was going ahead at full speed after she had got her trawl on deck she still had up her trawling lights as if she were a vessel not under command. In the judgment in *The Tweedsdale* (1) Sir Charles Butt carefully pointed out that those alternative lights were only to be carried when the vessel was not under command; and that as soon as she ceased to be trawling and was fully under command and able to go full speed ahead she should put up the proper side-lights. I will only read, to emphasize this and to shew that I accept the judgment in full, the last part of the judgment of Sir Charles Butt. It is as follows: "It must be observed that the regulation gives a trawler an option; she may either carry the lights which this trawler was carrying at the time, or she may carry in lieu thereof the regulation lights prescribed by art. 3 (of the old regulations)—that is, an ordinary steamer's lights. I think the option so given must be exercised with discretion, and I think the discretion given must be used in this sense. If a trawler has not only sufficient way on her to keep herself in command, but also sufficient way to act with effect in altering her course for an approaching ship, then what I may call the ordinary regulation side-lights, that is the lights prescribed by art. 3, should be carried, and those in charge of her should act as the regulations require an unincumbered vessel to act. If the trawler has no more than just steerage way, and has little power, therefore, of keeping out of the way of another vessel, she should carry what I call the extraordinary regulation lights, namely, the lights prescribed in the schedule I have just read, and the lights which this trawler was, in fact, carrying at the time of the collision. She should carry those lights and she should act as this vessel did. She should refrain from making

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(1) 14 P. D. 164.

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any alteration of her course and leave the other vessel to keep clear of her."

In that case the *City of Gloucester*, which was a steam trawler, did nothing. She had her trawl down and she kept her course, and the sailing vessel, the *Tweedsdale*, was held to blame for not keeping out of her way. If this trawler, the *Upton Castle*, was carrying those alternative lights, then she had no right to go ahead at full speed and throw herself across the bows of the ketch. In the case of the *Tweedsdale* (1) Sir Charles Butt goes on to say: "The *City of Gloucester* was going at such a rate as to give her bare steerage way, she was carrying the lights last mentioned, and I therefore hold her free from blame in this matter. I have been obliged to put the best construction I can upon rules which are not easy of interpretation, and I am perfectly well aware that it is almost impossible to put any construction that would not be open to some objection. The one I have adopted leaves a serious responsibility upon persons in charge of trawlers, and probably upon their owners, because they have to make up their minds as to what speed will barely give steerage way, and what will give something more; in other words, they must decide when their vessel ought to carry ordinary lights, under art. 3, and when she ought to carry the exceptional lights."

In this case, following that decision, with which I thoroughly agree, the trawler ought, as soon as she was under command and in a position to go full speed ahead, and before she went full speed ahead, to have shifted her lights and put up the ordinary side-lights, so as to give an indication to other vessels of what she was and under what conditions she was steering. For this reason I am of opinion that so far as the law is concerned at the time when this vessel, the *Upton Castle*, got across the bows of the ketch she was a vessel under command, and ought to have had the proper regulation side-lights up, and ought to have kept out of the way of the ketch, and ought to have had a proper look-out, which would have enabled her to see the ketch, and brought home to the minds of those in charge of her that it was not advisable to go full speed ahead. Following this decision, I am of opinion that at the time when the trawler was on the starboard side of the ketch and there was no risk of collision, the position was the position of sailing vessel and steamer, and it was the duty of the steamer to keep out of the way of the sailing vessel, and it was the duty of the sailing vessel to do nothing. In this case the sailing vessel did nothing, and she was right in so doing, but the trawler, when she was on the starboard side, went full speed ahead across the bows of the sailing vessel, and is alone to blame.

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(1) 14 P. D. 164.

Solicitors for plaintiff, owner of the *Rival: Williamson, Hill & Co., for Ingledew & Sons, Cardiff.*

Solicitors for defendants, owners of the *Upton Castle: William A. Crump & Son.*

T. L. M.

THE CRAFTSMAN.

1906
March 26, 27;
April 11.

Admiralty—Collision—Repatriation of Seamen—Payment by Consul—Norwegian Law.

By the Norwegian Maritime Code, if a ship is "lost," the expenses of sending home the master and crew are defrayed by the State, and, therefore, as such expenses do not ultimately fall upon the owners of the ship which is lost, they are not recoverable by them from the owners of the wrong-doing ship which caused the loss.

Motion in objection to the registrar's report.

The plaintiffs were the Aktieselskabit Congal, the owners of the *Congal*, the owners of her cargo, and her master and crew.

The defendants were the Charente Steamship Company, Limited, the owners of the *Craftsman.*

The case is reported on the question upon whom the liability rests for the cost of repatriating Norwegian seamen from a vessel lost by reason of collision with a wrong-doing vessel.

On February 9, 1905, about 2.50 P.M., the Norwegian steamship *Congal*, of 1412 tons gross, was lying moored at the buoys in the harbour of Port Said, in the course of a voyage from Cardiff to Hong Kong with coals, when the steamship *Craftsman*, in clearing the canal and manœuvring into a berth, fouled her, and, after doing considerable damage to her upper works, holed her below the water-line abaft the engine-room with a blade of the propeller, causing her to sink in thirty feet of water.

On February 10 and 14 surveys were held, including an examination of the vessel by a diver, and as it was recommended that a contract should be made with a salvage company to float her, tenders were invited. On February 24 the defendants, the owners of the *Craftsman*, admitted liability subject to a reference, and on the same day the Mutual Insurance Club in Christiania, who were the underwriters of the *Congal*, arranged on behalf of owners and underwriters to send out Captain Pharo, their agent in London, to examine on the spot, and report as to the condition of the vessel and the best course to adopt for raising her. He arrived at Port Said on March 1, and in view of the difficulty of getting any reasonable tender and of the refusal of the defendants to be parties to any contract to raise her, he treated the vessel as a constructive total loss, and, on behalf of the owners and underwriters of the *Congal*, abandoned the vessel to the Suez Canal Company. On March 12 the Norwegian consul defrayed the cost of sending home the officers and part of the crew. On March 17 Captain Pharo left Port Said, and on March 19 the master of the *Congal* left to return to Norway, the canal company having previously notified him to remove the wreck as an obstruction and danger, or that the company would raise the wreck at owners' expense.

On May 14 the canal company commenced salvage operations, and on June 19, after divers had discharged a large part of the cargo, the vessel was floated. On June 23 she was dry docked, and the collision damage temporarily repaired. On August 3 the canal company's charges were settled by the defendants for 3000*l*., and the *Congal* and her cargo being thereupon released, the vessel was on September 9 sold for 3060*l*. (2871*l*. net), the cargo subsequently realizing about 1000*l*.

On October 28 the defendants paid into Court 1708*l*. by way of tender in satisfaction of the claim filed on behalf of the owners of cargo, but the tender was rejected, and, at the reference, the owners of cargo recovered on the basis of the sound arrived value of the cargo at its ultimate destination, less the sum

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realized on sale at Port Said. In respect of the ship's claim, filed by the owners of the *Congal*, the items for the loss of the vessel, coals, provisions and stores, agency and consular expenses, survey fees, loss of charter, wages of master, officers, and crew, and their claim for their lost effects, amounted to 16,573*l.* 18*s.* 2*d.*, of which 10,020*l.* 18*s.* 1*d.* was allowed and paid by the defendants, less the net sum realized on the sale of the vessel, but two of the items, viz.—

	£	*s.*	*d.*
No. 7. Repatriating captain, officers, and crew, Norwegian Consul . . .	124	1	4
No. 20. Captain Pharo's travelling expenses to and at Port Said . . .	199	5	6

were, on November 8, disallowed by the registrar on the ground that, as to the first, by Norwegian law (1) the cost of repatriating the master and crew was borne by the State, and, as to the second, that "Captain Pharo was acting as agent for underwriters."

1906. March 26, 27. *Pickford, K.C.*, and *C. R. Dunlop*, for the plaintiffs, the owners of the *Congal* and others.

The cost of repatriating the foreign sailors of a foreign ship, that is, in this case the master, officers, and crew of the *Congal*, should have been allowed by the registrar as against the wrongdoer, for the owners of the *Congal* are liable for such expenses which constitute a charge on the vessel or its proceeds. They, in effect, diminish the value of the property preserved, and, according to the practice of the Admiralty Court, these expenses rank as high as wages. In *The San José Primeiro* (2) Dr. Lushington allowed a foreign crew their passage money home out of the proceeds of sale on "equitable" grounds independently of foreign law. The sections of the Norwegian Maritime Code, relied on by the defendants, are not in point, for the conditions precedent to any liability attaching to the State have not been complied with. By s. 6 "a survey according to law" must be held and the ship "deemed unfit for repair," but no such survey took place. The reports set out in the record of the two surveys which were held on February 10 and 14, 1905, so far from "deeming" the vessel

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(1) See note, *post*, p. 160.

(2) (1860) 1 Mar. L. C. 5.

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"unfit for repair," recommend that "arrangements should be made with a salvage company to float her." By ss. 40 and 41 the formalities are prescribed in respect of the maritime declaration to be made by the master as to material damage, and other details, which would lead up to the "survey according to law" which is required by s. 6. By ss. 91 and 98 the conditions under which the crew may be dismissed with their wages up to date, and the expenses of a free passage home defrayed by the State, are set out, the result being that unless the ship is lost, or, on account of the damage sustained, declared unfit for repair, the cost of a free passage home with subsistence falls on the owners, and, therefore, the sums paid by the Norwegian consul were merely advances made by the local authority to enable the seamen to get home on the abandonment of the voyage, and are recoverable under s. 7 from the owners of the *Congal*, who in turn are entitled to claim them from the owners of the *Craftsman* as wrong-doers. The crew have also under s. 270 the usual lien on the vessel or its proceeds: see *The Livietta* (1); *The Tagus* (2); and, on the payment by the consul of the passage money, he is entitled to stand in their shoes. These expenses ought, therefore, to be deducted from the proceeds of the *Congal*, for which the defendants have taken credit, and with which the registrar has not dealt in his report. Part of the sum claimed was for the passage money of the master, which was not paid by the consul, but by the master himself, and as he is a party to the action he is entitled to recover it.

Secondly, as to item No. 20, Captain Pharo's travelling expenses were reasonably incurred in the interests of all concerned, and the mere fact that he was the representative in London of the Norwegian insurance company in which the *Congal* was insured ought not to be a bar to the owners' right to recover these expenses from the wrong-doer, as it is usual for the surveyor to the underwriters not only to act for the owners of the vessel, but also, as in this case, to co-operate with the owners of the wrong-doing vessel in the attempt to minimize the loss.

Horridge, K.C., and *F. E. Smith*, for the defendants, the owners of the *Craftsman*. The value put upon the *Congal*

(1) (1883) 8 P. D. 209, at p. 213.

(2) [1903] P. 44, at p. 54.

by her owners was 10,800*l*., and at that value the vessel was not "lost" within the meaning of s. 98 of the Norwegian Maritime Code, because she was worth repairing; but when the registrar found the value to be 7000*l*. the position was altered, and ss. 6 and 98 applied. The result, therefore, is that as the owners of the *Congal* can only recover from the owners of the *Craftsman* what they would themselves be liable for, and as they are not liable either on their own account or as trustees for the Norwegian Government, they cannot recover in this action the expenses of sending the crew home. If the surveys were not held in strict accordance with Norwegian law, that is the affair of the owners of the *Congal*, and, as against the defendants, will not change the absolute payment by the Norwegian Government into a conditional advance. Similar reasoning applies to such portion of the expenses of sending home the master as was paid at the time by the Norwegian consul as well as to that portion paid by the master himself, as by s. 66 of the code the master is placed in the same position as the crew.

As to Captain Pharo's expenses, there was some misunderstanding in the registry; but, as there is no evidence that they were incurred on behalf of the owners of the *Congal*, they cannot be recovered from the owners of the *Craftsman*.

Pickford, K.C., in reply. The Norwegian consul advanced the money for sending the crew home in the usual way on the abandonment of the voyage, and could not have paid it on behalf of the Norwegian Government within the meaning of the sections of the code referred to, for, as now admitted by the defendants, the facts with regard to the value of the vessel, as against the cost of raising and repairing her, were not known at that time.

Cur. adv. vult.

April 11. Bargrave Deane J. The facts in this case, so far as material for the purposes of my decision, are shortly these: The steamship *Craftsman*, owned by the defendants, ran into and sank in the harbour of Port Said the steamship *Congal*, owned by the plaintiffs. The vessel being sunk in deep water with her cargo of coal on board her, the question arose whether it would be possible to raise her, considering what her value was, and considering what it would cost, also, to repair her. Ultimately her owners determined to abandon her, and she was subsequently raised by the Suez Canal Company. As far as I understand she was more or less a constructive total loss. The result was that the voyage upon which she was engaged had to be abandoned, and her crew were discharged and were sent home to Norway. The owners of the *Craftsman* admitted liability for the collision and for the loss occasioned thereby, and the claim of the owners of the *Congal* came before the registrar and merchants to ascertain the amount for which the owners of the *Craftsman* were liable in respect of the loss. The registrar made his report, and upon that report this case came before the Court on motion, the owners of the *Congal* objecting to the disallowance by the registrar of two items of their claim. One was an item of 124*l.* 1*s.* 4*d.*, which was the cost of repatriating the crew of the *Congal*, and the other item was for 199*l.* 5*s.* 6*d.*, the travelling expenses of Captain Pharo, who was employed by the underwriters to go out to Port Said to take what steps he could to get the matter dealt with at Port Said. The registrar has reported that in his opinion the cost of the repatriation of the master and crew of the *Congal* should be borne by the State of Norway, under the Norwegian Maritime Code. With regard to Captain Pharo's expenses, he says that he did not deal with that item at all, because he was under the impression that the counsel who appeared in the case had come to an arrangement with regard to it, and that therefore the matter was no longer before him. Those are the two questions which have been argued before me, and upon which I have to give a decision.

With regard to Captain Pharo's expenses, I have spoken to the registrar, and in his view that is a claim which should be allowed, in accordance with the practice of the registry, and if there had been no suggestion of an arrangement he would have allowed it. As to the question of amount, the registrar has looked into it, and he thinks the amount claimed is right.

The other point is a question of Norwegian law, and the sections which have been referred to particularly are ss. 6, 91, and 98 of the Norwegian code. I have considered those various sections. Sect. 6 seems to me only to apply in case there has been a survey, and provides that that survey shall be taken in a particular way. Sect. 91 is as follows: [The learned judge read the section set out in the note, and continued:—] In my opinion this ship was lost within the meaning of that section, and whether she was a total loss, or a constructive total loss, does not in this particular case seem to me to make much difference. She was lost, and the result, if she was lost, was that the services of the crew and their right to further wages terminated, and it was necessary that they should be sent back to their own country. As a matter of fact they were sent back, except the master, who remained at Port Said some little time, and the Norwegian consul at Port Said found the money which enabled them to go home. It is now said that although the Norwegian consul found the money for the purpose of repatriation, he only did it as agent for the owners—that they are liable to repay the money and are entitled to recover it against the wrong-doer in this collision.

The question I have to decide is whether that is the right view, or whether the Norwegian code, in such a case as the present, puts the liability upon the State to find the money. I am of opinion that the code does put the liability upon the State. Sect. 98 says: [The learned judge read the section set out in the note, and continued:—] The material words there are, "If the ship is lost . . . . the expenses shall be paid by the State." I find as a fact in this case that this ship was lost; that, therefore, these men had their voyage not only interrupted, but absolutely put an end to, and were entitled to a free passage, and that they were by s. 98 entitled to get the cost from the State.

I am, therefore, of opinion that the costs of sending these seamen home to Norway are not costs which are liable to be charged against the wrong-doer, but that the money which the consul has found he must recover from the State under Norwegian law. The result is that so far as this particular item is concerned, I find that the registrar's report is right. So far as the other item is concerned, the registrar did not deal with it, and I have been asked to do so, and have done so. I think that in the circumstances the proper course will be to

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dismiss the motion, and as the defendants have succeeded on the only substantial point in dispute, I dismiss the motion with costs.

Solicitors for plaintiffs: *Thomas Cooper & Co.*

Solicitors for defendants: *Pritchard & Sons, for Simpson, North, Harley & Co., Liverpool.*

NOTE.

The following translation of the material portions of the Norwegian Maritime Code of July 20, 1893, was used in Court:—

CHAPTER 1.—SHIPS.

Sect. 6: "A ship shall be deemed unfit for repair in the sense of this law, if by a survey according to law it is decided that the ship cannot be repaired at all, or that, at any rate, the repair cannot take place where the ship is then present, or at any other place to which it can be removed, or if, in like manner, it is decided that the ship is not worth repairing."

CHAPTER 2.—SHIPOWNERS.

Sect. 7: "Provided it is not otherwise determined in this law, a shipowner is personally liable, i.e., to the extent of his entire estate, for all liabilities incurred by himself, or on his behalf by other parties.

"For claims arising from the omission of the master to perform a contract entered into by the owner or owners directly, or by his or their authority, and which it was the duty of the master to carry out, as well as for engagements which the master in his capacity as such, and not in consequence of any special authority from the owner or owners, has entered into, the owner or owners shall be liable only to the extent of the estate of the ship, i.e., the ship and the freight; but the owner or owners are always personally liable for the seamen's claims under the articles and contracts of service. In the event of the bankruptcy of the owner or owners, these latter claims shall have the same priority as those of servants for wages due."

CHAPTER 3.—THE MASTER.

Sect. 40: "When in consequence of any occurrence at a place of loading or discharge, or during the voyage, the ship or cargo has suffered any material damage, or when there is good reason to suspect that such damage has been caused, or when any death by accident has occurred on board, or when by collision such damage or misfortune as aforesaid has been caused to any other ship, the master shall make a maritime declaration thereof.

"When in this kingdom (Norway) he shall, within the expiry of the day after the occurrence or discovery of the misfortune took place, notify the same to the President of the Court. If it happened at sea such term of grace shall be reckoned from the time of the ship's or ship-wrecked seamen's arrival at any roads or harbour. An exact copy of the contents of the log-book in respect to such misfortune shall be handed in with the notification or, if no log-book has been kept, or if it be lost, a written statement of the affair, together with a list of the crew of the ship and other persons who might be supposed capable of giving information in respect to the matter, and, if possible, a list of all persons interested in the case of their representatives. The President of the Court shall thereupon call a meeting of the Court to take the declaration, and adopt what further measures may be necessary in the case. The master shall produce the log-books in Court.

"When abroad the master shall, as early as possible, make the maritime declaration before the local authority competent to take such declarations at the place, or before the Norwegian consul, if the declaration, when made before him, will have sufficient legal effect. In all cases the consul must be warned in good time to be present, and the log-book shall be produced to and indorsed by him."

Sect. 41: "If during the voyage the ship has sustained damage necessitating any material repairs, or causing any protracted delay, the master shall cause a survey according to law to be held, at which the injury shall be inspected and an opinion be given as to what measures shall be taken for its repair, the cost of such repair, and the value of the ship in its damaged condition.

"On the completion of the repairs it shall be decided by a new survey whether the ship is in such condition that it can perform the intended voyage.

"If during the voyage the cargo has sustained any considerable damage, or if there be reason to believe that it is in such a condition as to necessitate its discharge, or the adoption of other measures for its preservation, or if such discharge is necessary for the sake of the ship, the master shall cause a survey and estimate according to law to be held. If the goods are found to be damaged the surveyors shall express an opinion on the circumstances supposed to have caused the damage, and on the measures it were best to adopt in consequence of such damage.

"When beyond the realm the surveyors shall be appointed according to the law or custom in force at the place, or by the Norwegian consul, where no special considerations require their appointment by the local authorities. At places where the appointment of surveyors is not customary, the master ought to take the opinion of experts."

Sect. 63: ". . . . If the ship is wrecked, condemned, captured or condemned as a prize, or taken by pirates, the service of the master, and, consequently, his right to further wages, shall cease. In the case of a casualty having occurred he must, however, remain on the spot until the affairs of the ship and the cargo have been settled, but he is entitled to reasonable compensation for the time thus passed."

Sect. 66: ". . . . If a ship is wrecked abroad, or declared unfit for repairs in consequence of damage sustained, or is taken by pirates, the expenses incurred in sending home the master shall be defrayed by the State."

CHAPTER 4.—THE CREW.

Sect. 91: "If the voyage is abandoned on account of war, blockade, embargo, prohibition of importation or exportation, ice, or damage, by which the ship is rendered unfit for the voyage, or if the voyage, or the continuation thereof, is suspended from such reason for any considerable period, the crew may be dismissed on payment to them of their wages up to the date of their dismissal.

"If the ship is lost, or declared to be

incapable of repair, in consequence of damage sustained at sea, or if it is captured, or condemned as a prize, or taken by pirates, the services of the crew, and their right to further wages, shall terminate. In case of shipwreck the crew must, however, at a fair remuneration, assist in salvage operations, and remain at the place in order to make the maritime declaration required."

Sect. 98: "If, in any such cases as are referred to in s. 91, the service of any Norwegian seaman terminates abroad, or if a Norwegian seaman when left behind abroad on account of any injury or illness is entitled by virtue of s. 90 to maintenance at the expense of the owners, such seaman shall be entitled to a free passage home with subsistence to the place to which he belongs. If the ship is lost, or, on account of damages sustained, is declared to be unfit for repairs, or is captured by pirates, the expenses shall be paid by the State, and this shall likewise hold good if the ship is captured and condemned as a prize, provided the master was not aware of the outbreak of war when he last put to sea, and such was also unknown at the port of departure. In all other cases the expenses shall be defrayed by the owners. . . . .

"If a situation can be obtained for a seaman thus entitled to a passage home on board any Norwegian, Swedish, or Danish ship bound for the country to which the seaman is to be conveyed, or any port conveniently situated for the sending home of the seaman, he shall be bound to accept such engagement if in a capacity not inferior to the rank he last held under the agreement."

Sect. 268: "A maritime lien upon the ship and the freight shall attach to the following claims:

"(2.) The claims of the master and the crew for wages and other remuneration to which they are lawfully entitled for service on board the ship."

Sect. 270: "If a ship has been lost or damaged, or, if freight has been entirely or partly lost under such circumstances as entitled the owner to compensation from any person responsible for the damage . . . . any creditor having a maritime lien upon the ship, or the freight, shall have the same lien on the amount to be paid as indemnification. . . . ."

T. L. M.

[IN THE ARCHES COURT OF CANTERBURY.]

THE OFFICE OF THE JUDGE PROMOTED BY THE BISHOP OF ST. ALBANS *v.* FILLINGHAM.

1906
Feb. 27.

Ecclesiastical Law—The Church Discipline Act, 1840 (3 *&* 4 *Vict. c.* 86), *s.* 13 *—Criminal Suit by Letters of Request—Pretended Ordination of Priest by Incumbent of Parish Church, not being a Bishop—Articles* 23, 34, *and* 36 *of Articles of Religion—Officiating in Nonconformist Chapel in Parish of another Incumbent—Disobedience to lawful Commands of Ordinary—Sentence—Discretion—Deprivation—Suspension ab officio et beneficio.*

It is an offence against ecclesiastical law for the incumbent of a parish church, not being a bishop, to purport to ordain a priest without having been given public authority to take upon himself the power of ordination.

The incumbent of a parish church, not being himself a bishop, after public notice and in express disobedience to the commands of the bishop of the diocese, read Evening Prayer, celebrated Holy Communion according to the use of the Church of England, and preached a sermon in a nonconformist chapel in another parish wherein he had no cure of souls, and also then and there purported to ordain a layman as a presbyter of the Church of God, reading portions of the form of ordering of priests according to the Prayer Book, and taking the part of the ordaining bishop:—

Held, in a criminal suit by letters of request brought under the Church Discipline Act, 1840, within two years of the above acts, in which suit the incumbent appeared as defendant and attempted to justify his actions as lawful, but at the close of the case regretted his error and submitted to the judgment of the Court, that the defendant, in so purporting to ordain a priest, was guilty of an offence against ecclesiastical law, punishable in the case of an incorrigible offender by a sentence of deprivation;

Held, also, that having regard to the defendant having stated at the hearing that he admitted and regretted his error, the Court would not pronounce sentence of deprivation against him, but would decree that the defendant be suspended ab officio et beneficio for two years, admonish him to abstain in future from the like offences, and condemn him in the costs of the proceedings.

The Court treated the undoubted and admitted offences of the defendant in officiating in a nonconformist chapel in the parish of another incumbent and in contumaciously disobeying the lawful commands of his ordinary as merged in, and overshadowed by, the offence of purporting to exercise the power of ordination of a bishop.

This case, in which the office of the judge was promoted by the Bishop of St. Albans against the defendant, the Rev. Robert

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ST. ALBANS (BISHOP) v. FILLINGHAM.

Charles Fillingham, vicar of the parish and parish church of Hexton, in the county of Hertford and diocese of St. Albans, came before the Court by virtue of letters of request signed by the Bishop of St. Albans in the first instance under the 13th section of the Church Discipline Act, 1840. The letters of request, dated April 6, 1905, having been duly accepted, a decree by letters of request issued and was served on the defendant, and on or about May 4, 1905, articles were exhibited against the defendant charging him (articles 1—9) with having within two years then last past offended against the common law ecclesiastical and the statutes, canons, and constitutions of this realm in that, being a clerk in holy orders of the Church of England under the degree of a bishop and subject to the jurisdiction of this Court, he had—after notice publicly posted up in various places in Southend, in the county of Essex and diocese of St. Albans, stating that an ordination service would be conducted at Emmanuel Church, Milton Street, Southend, on the evening of March 22, 1905, and that the defendant would then ordain the Rev. A. C. White to the office of presbyter in the Church of Jesus Christ, and notwithstanding a formal command in writing from the Bishop of St. Albans to take no part whatever in the proposed ordination or in any way to officiate at such a service held within the diocese of St. Albans, on the day named in the notice, without the licence or authority of the Bishop of St. Albans and contrary to his lawful command (1)—publicly in the said Emmanuel Church, the same being a building not consecrated or in any manner dedicated to divine service according to the rites of the Church of England, but a building then registered under the Places of Worship Registration Act, 1855 (18 & 19 Vict. c. 81), as a place of meeting for religious worship of the Protestant and Evangelical Church, purported to ordain one A. C. White to the office and work of a presbyter in the Church of God, and to confer upon him authority to preach the word of God and to administer the holy sacraments to the congregation, and publicly performed divine service, preached and administered the Sacrament of the Lord's Supper as set forth in the 10th to 16th articles of the articles.

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(1) The material portions of the letters which passed between the promoter and the defendant on this occasion are referred to in the judgment of the Court.

Of these articles, articles 10 to 13 and article 16, after a statement that while purporting to ordain Mr. White, performing the said divine service, preaching and administering the Sacrament of the Lord's Supper, the defendant wore a surplice, stole and Master of Arts hood, gave details of the reading by the defendant of portions of the service of Evening Prayer according to the use of the Church of England, and of the service for the administration of the Holy Communion according to the same use down to the Nicene Creed; of his reading the letters which had passed between him and the Bishop of St. Albans with reference to the so-called ordination, and of his then preaching a sermon, and subsequently to the so-called ordination administering the Sacrament of the Lord's Supper, whilst articles 14 and 15 were, so far as material, in terms as follows:—

14. "At the conclusion of the sermon the defendant read the exhortation in the form and manner of ordering of priests according to the use of the Church of England, which begins with the words 'Ye have heard,' making alterations therein; the defendant then asked the said A. C. White the questions prescribed in the said form, with the exception of that which begins with the words 'Will you reverently obey your ordinary,' which he omitted, making also various alterations in and omissions from the words of the other questions. The defendant then said the prayer which begins 'Almighty God, who has given you this will,' the Veni Creator Spiritus, and the prayer which begins 'Almighty God and Heavenly Father,' in accordance with the said forms. The defendant then asked one C. T. Beckett to join with him in the laying on of hands."

15. "The defendant and the said C. T. Beckett, both standing, then laid their hands on the said A. C. White, who was standing or kneeling before them, and the defendant said, "Receive the Holy Ghost for the office and work of a presbyter in the Church of God'; and the defendant then delivered the Bible into the hand of the said A. C. White and said, 'Take thou authority to

preach the word of God and to minister the Holy Sacraments in the congregation.' "

The admission of the articles was not opposed, and a negative issue having been given thereto, a responsive plea, dated June 7, 1905, was filed on behalf of the defendant and was by consent and the leave of the Court amended at the hearing. As so amended, it in the 1st, 2nd, and 3rd paragraphs thereof admitted the statements as above mentioned in the 2nd, 5th, 6th, 7th, 8th, 10th, 11th, 12th, 13th, and 16th articles, and the use of the several prayers, exhortations, and passages of Holy Scripture in the 14th and 15th articles above set out, and that the defendant did and performed the acts in those two articles mentioned, but denied the matters alleged in the 1st, 3rd, and 4th articles (1) ; and proceeded in the remainder of the 3rd and the 4th paragraphs, so far as material, in terms as follows :—

3. " The defendant denies that by so doing and performing the acts mentioned in the said 14th and 15th articles and by using the said forms of prayer, exhortations, and passages of Holy Scriptures he used or purported to use the form and manner of ordaining priests prescribed in the Book of Common Prayer. The defendant says that in using the form of words and doing the acts alleged and admitted as aforesaid he had no intention of ordaining, and did not in fact ordain, a priest according to the order of the Church of England, and that the authority to preach the word of God and to minister the Holy Sacrament in the congregation which he intended and purported to confer was the authority of a presbyter in the Church of God according to the most ancient and primitive conception thereof. The defendant admits the statements in the 9th article, save in so far as the same alleges that the commands of the promoter therein referred to were lawful, which he denies."

4. " The defendant denies that he has offended against the law in the premises and rendered himself liable to canonical punishment and correction, and prays that this honourable

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(1) These were formal articles alleging the duty of clerks in holy orders of the Church of England not to commit the offences against ecclesiastical law charged against the defendant in the remainder of the articles.

Court will be pleased to dismiss the suit and to condemn the promoter in the costs thereof."

Dec. 18, 19, 1905. On these days the suit was heard before the Dean of the Arches (Sir Lewis Dibdin, D.C.L.).

Lord Robert Cecil, K.C., and *A. B. Kempe* (on behalf of the promoter, the Bishop of St. Albans). The articles disclose three principal breaches of ecclesiastical law by the defendant: First, the pretended ordination by him of a layman in a nonconformist place of worship within the parish of another incumbent; secondly, the publicly performing divine service, preaching, and administering the service of the Holy Communion by him at the same place and on the same occasion; and, thirdly, the disobedience by him, in all the foregoing matters, to the lawful commands of his ordinary.

As to the first of these breaches of ecclesiastical law, although there has been no actual decision as to the unlawfulness of what the defendant has done, it is clear that not only by the common law ecclesiastical, but also according to the canons, constitutions, and formularies of the Church of England, and quite apart from the Statutes of Uniformity allowing no unauthorized deviation from the Prayer Book services (2 & 3 Edw. 6, c. 1, s. 1; 5 & 6 Edw. 6, c. 1, s. 5; 13 Eliz. c. 12, s. 2; 14 Car. 2, c. 4, ss. 1, 16, 17, 20), the ordination of presbyters was from the earliest times reserved exclusively to the order of bishops, and the usurpation of the power of a bishop in this respect is a very serious ecclesiastical offence on the part of any person in holy orders under the degree of a bishop, and has been so treated historically by Anglican divines and other writers of authority referred to as illustrating what the ecclesiastical law is: *Kemp* v. *Wickes* (1); *Sheppard* v. *Bennett.* (2) Thus, to quote Hooker's Laws of Ecclesiastical Polity, book 7, ch. 6, s. 3: "Again, the power of ordaining both deacons and presbyters, the power to give the power of order unto others, this also hath been always peculiar unto bishops. It hath not been heard of, that inferior presbyters were ever authorized to ordain. . . . . The apostles being bishops at large, ordained everywhere presbyters." (1) Whilst in Bingham's Antiquities of the Christian Church there is this passage: "But to return to the bishops of the primitive church. There were other offices, which they very rarely entrusted in the hands of presbyters . . . . such were the offices of reconciling penitents, confirmation of neophytes, consecration of churches . . . . and some other of the like nature. . . . . But there was one office, which they never entrusted in the hands of presbyters nor ever gave them any commission to perform; which was the office of ordaining the superior clergy, bishops, presbyters, and deacons." (2)

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(1) (1809) 3 Phillim. 264, 276.

(2) (1871) L. R. 4 P. C. 371, at p. 417.

Passages to the same effect are to be found in Field, Of the Church, book 5, ch. 27 (vol. iii., pp. 217, 218), and ch. 56 (vol. iv. pp. 150, 151); Wheatly, On the Book of Common Prayer (ed. 1846), ch. 2, s. 3, par. 2, pp. 81, 85 (3); Bishop Beveridge, Discourse of the Thirty-nine Articles (Article 36), — Works, vol. 7, pp. 547, 554; Bishop Harold Browne, Exposition of the Thirty-nine Articles, 9th ed. pp. 553, 557; and Nicholls Supplement to the Commentary on the Book of Common Prayer (Preface to the Ordination Service, note (*c*), ed. 1711), and shew clearly how the power of ordination of priests and deacons was always considered to have been reserved in practice for bishops alone. It is also clear from the formularies, canons and constitutions of the Church of England that according to their provisions it is not now, and never was, lawful for persons under the degree of a bishop to ordain either priests or deacons, conditions being in many cases required on the performance of ordination such as could only be fulfilled by bishops: see Canons 31—35, 135 of the Canons of 1603 as to the time and manner of ordination; the qualifications after examination and otherwise, &c., of persons offering themselves to be ordained and the fees to be then taken;

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(1) Hooker's Works, by Keble (ed. 1836), vol. 3, pp. 206, 207.

(2) Bingham's Antiquities of the Christian Church, vol. 1, book 2, ch. 3, sect. V.—2, p. 85. See Watson's Complete Incumbent (ed. 1747), ch. 14, pp. 141, 142.

(3) See Phillimore's Ecclesiastical Law, vol. 1, ch. 3, pp. 90, 91.

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and the form of ordaining a bishop, shewing the duties of the bishop in holding ordinations; and in other cases the language used, as, for example, in the ordination service and in Articles 23, 34 and 36 of the Articles of Religion (1), amounting (when the provisions of Canons 36, 37, and 38 of 1865 and the Clerical Subscription Act, 1865 (28 & 29 Vict. c. 122), requiring persons in holy orders to assent to the Articles of Religion and use the form in the Prayer Book, and none other, except when ordered by lawful authority—*Newbery* v. *Goodwin* (2)—are taken into consideration) to an express prohibition of ordination by other than bishops.

[THE DEAN OF THE ARCHES. The case of *Heath* v. *Burder* (3) is an authority that the contradiction of any doctrine laid down in the Thirty-nine Articles of Religion is an offence against ecclesiastical law, but in order to ascertain what the existing law is it would be of some assistance to inquire what, if any, were the provisions of the older canon law with respect to such an offence as that charged against the defendant in connection with the so-called ordination. For instance, the usurpation of the office of a bishop would from the 28th title of the Decretal of Gregory IX., cap. 1, appear to have been an irregularity: Corpus Juris Canonici: Richter, vol. 2, p. 802 (X. 28, 1).]

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(1) The material portions of these two Articles of Religion are as follows:—

Article 34: "*Of the Traditions of the Church.*— . . . . Whoever through his private judgment, willingly and purposely, doth openly break the traditions and ceremonies of the Church, which be not repugnant to the Word of God, and be ordained and approved by common authority ought to be rebuked openly (that others may fear to do the like), as he that offendeth against the common order of the Church and hateth the authority of the Magistrate and woundeth the consciences of the weak brethren. . . . ."

Article 36: "*Of Consecration of Bishops and Ministers.*—The Book of Consecration of Bishops and Archbishops and ordering of priests and deacons, lately set forth in the time of Edward the Sixth, and confirmed at the same time by authority of Parliament, doth contain all things necessary to such consecration and ordering: neither hath it anything that is superstitious or ungodly. And therefore whosoever are consecrated or ordered according to the Rites of that Book, since the second year of the aforenamed King Edward unto this time, or hereafter shall be consecrated or ordered according to the same Rites; we decree all such to be rightly, orderly, and lawfully consecrated and ordered."

(2) (1811) 1 Phillim. 282.

(3) (1862) 15 Moo. P. C. C. 1.

The earlier canons and constitutions of the Church of England and the portions of the general canon law received here (25 Hen. 8, c. 19; *Escott* v. *Mastin* (1)) equally treat the ordination of priests and deacons as well as the examination of the persons to be ordained as matters reserved solely to the bishop of the diocese: Lyndwood's Provinciale (ed. 1679), lib. 1, tits. 5 and 6; De Scrutinio in Ordine faciendo and De Sacra Unctione, pp. 32, 33; ibid., Legatine Constitutions of Otho, pp. 16—18; De Scrutinio Ordinandorum; Van Espen, Jus Ecclesiasticum Universum, vol. 1, pt. 2, s. 1, tit. 9, c. 2, par. 9; Canons of Chelsea; Haddan and Stubbs' Councils and Ecclesiastical Documents relating to Great Britain and Ireland, vol. 3, p. 584; Ayliffe, Parergon, pp. 400, 403; Johnson's Canons, ed. 1851 (Library of Anglo-Catholic Theology), vol. 2, p. 155, A.D. 1237; Constitutions of Otto (Otho), art. 6, Ibid., vol. 1, p. 307; 11th Canon of Wulfred, vol. 1, A.D. 816; the following constitution of the Provincial Constitutions of Archbishop Walter Reynolds being perhaps most to the point, and providing as follows: "How reverently, contritely, and devoutly men should go to the sacrament of order is shewn by this, that it is conferred by none but the high priest, that is by the bishop, and at certain places and times . . . . therefore, regarding the canons, we forbid any to come or to be admitted to orders without canonical examination." Johnson, Canons (ed. 1851), vol. 2, p. 333, A.D. 1322, and Lyndwood's Provinciale, Appendix of Provincial Constitutions, p. 39.

Is it really conceivable that episcopacy and ordination by bishops is not a part of the ecclesiastical law of the Church of England? Indeed, the only difficulty to be encountered in the present case on behalf of the promoter is that, to use the language of James L.J., common matters of law are the most difficult of proof. (2)

With regard to the remaining charges against the defendant—the intrusion of the incumbent of one parish into the parish of another incumbent without the leave of that other and the consent of the bishop of the diocese is an undoubted ecclesiastical offence: *Richards* v. *Fincher* (1); *Nesbitt* v. *Wallace*. (2) There is equally no doubt that the defendant committed an offence against ecclesiastical law in publicly reading prayers, preaching, and administering the Holy Communion without the licence of the bishop of the diocese in an unconsecrated building in a parish wherein he had no cure of souls: *Smith* v. *Lovegrove* (3); *Carr* v. *Marsh* (4); *Hodgson* v. *Dillon* (5); *Freeland* v. *Neale* (6); *Barnes* v. *Shore*. (7) Moreover, it being clear that the commands given by the promoter and disobeyed by the defendant were lawful commands, the defendant has admittedly contravened the ecclesiastical law by his contumacious disobedience in that respect: *Rugg* v. *Bishop of Winchester* (8); *Long* v. *Bishop of Cape Town*. (9)

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(1) (1842) 4 Moo. P. C. C. 104.

(2) See *Wilson* v. *M'Math*, (1819) 3 Phillim. 67, 76.

There is ample authority for holding that the Court has power to pronounce a sentence of deprivation against the defendant for the offences he has committed in this case: *Caudrey's Case* (10); *Combe* v. *De La Bere* (11), and the cases there cited; *Heywood* v. *Bishop of Manchester* (12), and there are no circumstances to induce the Court in its discretion to pass any lighter sentence. The defendant obviously intended to ordain Mr. White to the same holy orders to which he had been himself ordained by episcopal ordination, and not merely to set a layman aside for a special purpose as a missioner or the like, and whilst persisting in contumaciously disobeying the commands of the promoter he has not expressed any regret for his conduct, even up to the present time.

[They also referred to Canons 14 and 53 of the Canons of 1603.]

Hume-Williams, K.C., and *Sturge*, for the defendant. All the material facts alleged in the articles are admitted with this qualification, that the defence of the defendant is that the commands of the promoter, the Bishop of St. Albans, ordering him to refrain from the acts done and performed by him on March 22 last at Southend—acts, in the opinion of the defendant, not contravening ecclesiastical law—were not lawful commands, and therefore were commands such as he was justified in disregarding; his main contention being that there is no law in the Church of England by which a presbyter is forbidden to ordain a presbyter of the Church of God by the laying on of hands. Whilst, however, it is contended that none of the acts complained of amount to ecclesiastical offences, it is, at any rate, a question of such grave doubt as to the defendant having been guilty of any offence in conducting the ordination, that the Court, even if it is of opinion that the law has been technically infringed by the intrusion of the defendant into the parish of another incumbent, ought not to pass a sentence of deprivation, or do more than merely admonish the defendant. The ordination conducted by the defendant was the ordination of a nonconformist minister by the authority of the congregation of Emmanuel Church, Southend, and a matter taken on himself by the defendant from a conscientious desire on his part to assist in bringing about a closer union between the Church of England and the nonconformist Protestant Churches in this country, and was not the ordination of a priest or deacon of the Church of England, and by conducting it in the circumstances, no unlawful act was committed; but even if the ordination had been the conferring of holy orders in the Church of England, the act would not have been an offence against ecclesiastical law or the usurpation of the office of the bishop, for there is nothing in the present formularies, constitutions, or canons of the Church of England to make it clear that ordination by a presbyter is not still as allowable as episcopal ordination, the 23rd Article of Religion (1) not confining ordination to bishops alone, but

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(1) (1874) L. R. 4 A. & E. 255, 262.

(2) [1901] P. 354.

(3) (1755) 2 Lee, 162, at pp. 171, 172.

(4) (1814) 2 Phillim. 198, 203.

(5) (1840) 2 Curt. 388.

(6) (1848) 1 Roberts. 643.

(7) (1846) 1 Roberts. 382, 395.

(8) (1868) L. R. 2 P. C. 223.

(9) (1863) 1 Moo. P. C. C. (N.S.) 411, at p. 465.

(10) (1595) 5 Rep. 1.

(11) (1881) 6 P. D. 157.

(12) (1884) 12 Q. B. D. 404, at p. 418.

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(1) This Article of Religion is in terms as follows:—

Article 23: "*Of Ministering in the Congregation.*—It is not lawful for every man to take upon himself the office of public preaching, or ministering the sacraments in the congregation, before he be lawfully called and sent to execute the same. And those we ought to judge providing that ordination may be by those who have public authority given them for that purpose.

The Book of Common Prayer always refers to the practice of the primitive Church with approbation, as, for example, in the Preface to the Communion Service, and it is therefore important that for a period of about 150 years in the first history of that Church there is no trace of any ordination except by presbyters: 1 Tim. iv. 14; 1 Pet. v. 1; Acts xx. 17; Ayliffe's Parergon, pp. 398—399; Bishop Lightfoot, On the Christian Ministry, ed. 1890, pp. 195, 196, 231, 232; Epistle to the Philippians, ed. 1879, pp. 95, 186, 199, 207, 227, 231, 232, 233; Bishop Cosin's Works, vol. 4, pp. 403, 404, *et seq.*; Bishop Hall, Episcopacie by Divine Right Asserted, ss. 2, 3, 4.

[THE DEAN OF THE ARCHES referred to the Preface to the Ordination Service in the Prayer Book as shewing the value attributed to the practice of the primitive Church, and as inferring from that practice that there were in that Church three orders in the ministry, namely, bishops, priests and deacons.]

Episcopacy did not begin until after these first 150 years, and episcopal ordination continued to be the rule after the introduction of episcopacy until the Reformation. After the Reformation, however, there was a denial of episcopacy by the Scotch Church, the foreign Protestant Churches, and a large party within the Church of England, and owing to the scarcity of ministers many benefices in England were filled by ministers who had not received episcopal ordination; the 13 Eliz. c. 12 expressly providing that every ecclesiastical person ordained by reason of any other form than the form of ordination in the Book of Common Prayer should subscribe to such of the Articles of Religion as are in that Act referred to: Dr. F. G. Lee, On the English Church under Elizabeth, pp. 162, 163, 206, ed. 1892; The English Church and the Ministry of the Reformed Church, by the Rev. Edward

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lawfully called and sent, which be chosen and called to this work by men who have public authority given unto them in the Congregation, to call and send Ministers into the Lord's vineyard."

Denny, pp. 39 *et seq.*, ed. 1900 (1); Archdeacon Sinclair's Tenth Charge, Tuesday, May 30, 1902, pp. 50—54, 67. There is, therefore, strong evidence that even at that time episcopal ordination was not considered essential in the Church of England. And since then many eminent persons have held, in accordance with what is the opinion of many members of the Church of England at the present day, that episcopal ordination is not the only admissible method of ordination, but that ordination may be by the laying on of hands by a priest. In fact, ordination by bishops is not of the esse but of the de bene esse of the doctrine of the English Church: Southey, Life of Wesley and Rise and Progress of Methodism, ed. 1845, vol. 2, pp. 297—301; Harnack, History of Dogma (Theological Translation Library), vol. 2, pp. 212—216; Peter Lord King, Constitution of the Primitive Church, p. 54; Canon W. Sanday, The Conception of Priesthood in the Early Church and the Church of England, pp. 39, 68, 99, ed. 1899; Luckock, The Church in Scotland—(Spottiswoode's Case), pp. 172, 173.

[The following authorities were also cited: Blunt's Annotated Book of Common Prayer—Introduction to the Ordinal—p. 543, ed. 1869; *Hodgson* v. *Oakeley* (2); *The King's Proctor* v. *Stone*. (3)]

Lord Robert Cecil replied.

Cur. adv. vult.

Feb. 13, 1906. The Dean of the Arches. The Rev. Robert Charles Fillingham is the vicar of Hexton, in the diocese of

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(1) The Church Historical Society, London (Society for Promoting Christian Knowledge), No. 57.

(2) (1845) 1 Roberts. 322.

(3) (1808) 1 Hagg. Cons. 424. In certain correspondence which passed between the promoter and the defendant before the institution of the suit the defendant referred to two cases which he considered to form two precedents in the Church of England of presbyters setting apart or formally ordaining persons for the work of the ministry, writing as follows: "Whittington, Dean of Durham in the reign of Elizabeth, was in Presbyterian orders, and in the sister Church of Ireland, Lancaster, Archbishop of Armagh, ordained priests before he had been himself ordained a bishop." These so-called examples were not relied on by counsel for the defendant at the hearing, probably because no cure of souls was attached to the deanery of Durham, and Lancaster, afterwards Archbishop of Armagh, having been, as was pointed out during the argument, a suffragan bishop at the time of the ordinations in question in Ireland. [See Dictionary of National Biography, vol. 32, p. 43.]

St. Albans. Early last year it was publicly announced that he proposed to "ordain" a gentleman named White. The Bishop of St. Albans asked for an explanation, and Mr. Fillingham informed the bishop in writing that being of opinion that ordination could be effected by a presbyter as well as by a bishop, he had consented to ordain Mr. White to the presbyterate of a nonconformist chapel at Southend, in the diocese of St. Albans. Mr. Fillingham stated that the main object of Mr. White's mission at Southend was to oppose certain ritual practices of the incumbent of All Saints', Southend, which Mr. Fillingham condemned as illegal and dangerous. The bishop formally enjoined Mr. Fillingham to take no part in the proposed ordination, and on Mr. Fillingham proposing conditions, in the event of the bishop's compliance with which he would consent to abandon his purpose, the bishop insisted on Mr. Fillingham's unconditional obedience, and in a final letter repeated his monition and warned Mr. Fillingham that, if he disobeyed it, proceedings would be taken against him. Notwithstanding these warnings, Mr. Fillingham proceeded on March 22, 1905, to carry out his plan at a nonconformist chapel situate in the parish of All Saints', Southend. He appeared robed in his surplice, stole and hood, read Evening Prayer, and celebrated Holy Communion according to the use of the Church of England, preached a sermon, and also purported to "ordain" Mr. White. The Form of Ordering of Priests according to the Prayer Book was used with certain variations, Mr. Fillingham taking the part of the ordaining bishop. He laid his hands on Mr. White's head and said: "Receive the Holy Ghost for the office and work of a presbyter in the Church of God," and he delivered a copy of the Bible into Mr. White's hands with these words: "Take thou authority to preach the word of God and to administer the Holy Sacraments in the congregation." Mr. White has ever since this so-called ordination, and I suppose in consequence of it, carried on services at this chapel, and has administered Holy Communion to those who are willing to receive it from him.

These facts are admitted.

Whether Mr. Fillingham's opinion of the illegality and danger of the ritual practices of the incumbent, whose ministrations

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Mr. White was ordained to oppose, be well founded or not—and his counsel most properly abstained from going into the matter—is immaterial to the issue I have to decide. Mr. Fillingham cannot justify his acts, assuming them to be otherwise unjustifiable, by shewing that they were intended to counteract the wrongful acts of some one else. Moreover, the law provides machinery for repressing unlawful ritual practices which Mr. Fillingham might himself have set in motion, but did not attempt to do so, though he invited the bishop to interfere. This suit, in which the Bishop of St. Albans is the promoter, was begun by letters of request to me dated April 6, 1905. Mr. Fillingham, on June 7, 1905, in answer to the articles, while admitting the facts alleged against him, denied that he had offended against the law, and alleged that the authority which he intended to confer "was the authority of a presbyter in the Church of God according to the most ancient and primitive conception thereof." He appeared by counsel at the hearing, and they argued that Mr. Fillingham was entitled to act in the way I have described. It must be taken, therefore, that Mr. Fillingham, having in the first instance deliberately, and after repeated warnings, committed the act complained of, has equally deliberately, after many months' opportunity for consideration, adhered to his main position as right and justifiable. His counsel, indeed, rather emphasized this attitude by contending that even if any offence had been committed it was not Mr. Fillingham's assumption of the function of ordaining a priest, but what they described as a merely technical intrusion in another incumbent's cure of souls by officiating therein against the will of the bishop.

The offences with which Mr. Fillingham is charged are—(1.) Purporting to ordain a priest without being himself a bishop; (2.) Preaching and celebrating the Holy Communion outside his own cure of souls without the authority of the bishop of the diocese; (3.) Contumacy or disobedience to the lawful commands of the bishop of the diocese.

The Preface to the Ordinal states that, to the intent that the orders of bishops, priests, and deacons may be continued and reverently used and esteemed in the Church of England, no man is to be accounted or taken to be a lawful bishop, priest, or deacon in the Church of England except he be called, tried, examined, and admitted according to the Form of Ordination contained in the Prayer Book, or has had formerly episcopal consecration or ordination. The Ordinal requires that a priest should be ordained by a bishop, and that before being so ordained he should be in Deacon's Orders: see Rubric, at the end of Form of Ordering of Deacons: Lyndwood's Provinciale, ed. 1679, p. 31, note to "Furtive." When Mr. Fillingham purported to ordain Mr. White to be a presbyter in the Church of God, using the acts and the words prescribed by the Church of England to be used for the ordination of priests, I think he purported to ordain a priest in the sense in which the Preface to the Ordinal employs the term when it says that no man shall be accounted a lawful priest in the Church of England unless he has been episcopally ordained. The admitted purpose of the so-called ordination helps to make the situation clear. Mr. White was made a presbyter in order that he might officiate, preach, and administer the sacraments at Southend in the cure of souls of a clergyman whose ritual practices Mr. Fillingham deemed dangerous: that is, Mr. White was ordained to do the work of a parish priest instead of the regularly appointed incumbent. Thus, in making Mr. White a presbyter, not only was the form of conferring orders in the English Church used, but the purpose of his ordination was that he should do the regular work of a presbyter in the Church of England. In my opinion, therefore, it is impossible to regard Mr. Fillingham's act as something outside and independent of the Church of England. The 23rd Article of Religion says—(1.) that it is not lawful for any man to take upon him the office of public preaching or ministering the sacraments in the congregation before he be "lawfully called and sent"; and (2.) that we ought to judge those lawfully called and sent who are chosen and called to this work by men who have public authority given unto them in the congregation to call and send ministers into the Lord's vineyard." Mr. Fillingham has not been given public authority either to call and examine persons with a view to their ordination, or to admit them to Holy Orders. He has not only taken upon himself to usurp a function which the Church of England has declared to belong exclusively to a Bishop, but he has also chosen to exercise the function so usurped for the purpose of admitting to the priesthood a man who had not been called or examined by those possessing public authority to do so, and who had not been admitted to Deacon's Orders. It will be observed that the terms of the 23rd Article of Religion are general and applicable to any form of Church government. The Article affirms that, in the view of the Church of England, Christian ministers must always and everywhere be chosen and sent by those who have public authority to do this, that is to say, not by individuals at their own discretion. These conditions, therefore, according to the Article, are essential for all presbyters who are commissioned to minister the word and sacraments, whether they profess allegiance to the Church of England or claim to be included in some more comprehensive commission. I think that Mr. Fillingham's acts (1.) in purporting without authority to call and choose a minister contrary to the 23rd Article, and (2.) in purporting to ordain a presbyter without being himself a bishop contrary to the Ordinal, constitute ecclesiastical offences. They are in flat contravention of the passages to which I have referred in the Ordinal and in the 23rd Article of Religion. It is no more competent for a clergyman of the Church of England to act in direct opposition to the Ordinal or the Articles of Religion than to deprave them by word or in writing. To do either the one or the other is an offence against the common law of the Church of England, quite apart from the enactments which have made depraving the Prayer Book (1 Eliz. c. 2, s. 5) and maintaining doctrines contrary to the articles (13 Eliz. c. 12, s. 2) statutory offences: see Sir John Nicholl's observations in *Wilson* v. *M'Math* (1) and Sir H. Jenner Fust's observations in *Sanders* v. *Head*. (2)

Although the express statements of the Ordinal and Article to which I have referred are directly applicable, Mr. Fillingham's offence against the law of the Church of England would be the same even if those statements did not exist, because his acts offend against the whole order and constitution of that Church. The Church of Christ is a body entrusted with the administration of certain spiritual powers which it must necessarily exercise through representatives or delegates. It has taken pains from the beginning to indicate in some formal way the persons through whom it purposes to act and to insist that its ministers should be chosen and appointed by persons authorized to do this on behalf of the Church. The Church of England is subject to episcopal government. It is immaterial to consider whether this is or is not the only right or perfect ecclesiastical constitution. It is enough for the purpose in hand that the particular method that the Church of England has adopted of choosing fit men to be ministers and of formally admitting them to Holy Orders is by placing these duties in the hands of the Bishops. Mr. Fillingham is a presbyter ordained and beneficed in the Church of England. In purporting to ordain Mr. White and in administering Holy Communion on the same occasion he assumed to act in his capacity as a presbyter of the Church of England, and emphasized the fact by wearing the robes of an English clergyman. The avowed object of Mr. Fillingham's action was that the person so ordained might administer the sacraments and otherwise exercise the Christian ministry in substitution for and in opposition to the ministrations of a regularly ordained and duly commissioned clergyman of the Church of England. Mr. Fillingham is therefore claiming, first, the right to select and admit ministers in independence of the body of which he is not only a member but a minister; and, secondly, the right to exercise this independence for a purpose avowedly antagonistic to the body in its executive action. It seems to me that the first sets aside a principle which underlies all ecclesiastical polity, and is an usurpation by an individual of powers which belong to the Christian society itself, and that the second is an act of rebellion against the organization and discipline of the Church of England.

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(1) (1819) 3 Phillim. 67, at pp. 78, 79.

(2) (1843) 3 Curt 565, at p. 580.

Mr. Fillingham's plea that he is not purporting to ordain a priest according to the order of the Church of England, but a presbyter in the Church of God, and so has done nothing inconsistent with the Preface to the Ordinal, even if it could be sustained, clearly does not meet the case against him regarded in this, its most general, and I venture to think its gravest, aspect. Neither can I accept the defence which seemed to be suggested at the Bar, that so long as Mr. Fillingham adequately discharges the legal duties of his cure, he is free to devote his leisure to the service of religious bodies distinct from and acting in opposition to the Church of England. I do not know how far this restriction of the obligations of the sacred calling of the Ministry "within office hours" is to be pressed. Are clergymen, for example, to be held exempt when "off duty" from ecclesiastical discipline in matters of morality? And if not, where is the line to be drawn? Common sense and common honesty require that a clergyman's life should be consistent throughout, and that as it would be a scandal that he should preach virtue and practice vice, so it is not allowable that he should serve the Church of England in a position of trust in one place while he repudiates its very constitution elsewhere.

As I have already said, Mr. Fillingham's offence is not affected by particular views of the nature and history of the Christian ministry; such, for instance, as that the Episcopate grew out of the priesthood some time after the age of the Apostles; that Bishops and priests are the same in order, and only differ in office; that Presbyterian ordination, though irregular, is not necessarily invalid, and that where resorted to under necessity Presbyterian ordination may be allowable, and was sometimes recognized prior to 1662 as valid in the Church of England. A large part of the learned and interesting arguments addressed to the Court on Mr. Fillingham's behalf consisted in the citation of extracts from the writings of those great divines of the Church of England who have supported some or all of these propositions. I cannot conceive it being seriously disputed that these opinions have been and are widely held in the Church of England without offence or any question of loyalty or orthodoxy; but it is only necessary to refer to the writings of authorities who have been cited here to appreciate the wide distinction between the holding of the opinions to which I have alluded and the commission of such acts as these with which Mr. Fillingham is charged. I have not heard from his counsel that any of the authorities on whom they rely, or, indeed any Anglican divine at all, has suggested that a presbyter of the Church of England is or ever has been empowered to admit a layman to priest's orders in order that he may officiate in an English parish which already possesses a duly instituted incumbent. On the contrary, I find in the works of several of the divines cited in defence of Mr. Fillingham emphatic repudiation of the notion that the facts of early Christian history could justify a presbyter of the Church of England taking upon himself a bishop's function in ordination.

Thus Bishop Hall, under the heading "Power of Ordination only in Bishops," writes: "That Presbyter had been a master among Christians that would have dared to usurp it" [power of ordination], "and the Church of those first ages observed it so curiously that, besides those strict laws which they made for the prevention of any such insolence, restraining even one kind of Chorepiscopi Rural Bishops . . . . they have left unto us memorable proofs of their severe proceedings against such presumptions." (1)

Dean Field writes: "Whence it will follow that ordination being a kind of sacrament, and so depending of the power of order in the judgment of our adversaries, might be administered by presbyters; but that for the avoidance of such horrible confusions, scandals, and schisms as would follow upon such promiscuous ordinations they are restrained by the decree of the Apostles and none permitted to do any such thing, except it be in case of extreme necessity, but Bishops . . . ." (2)

Bishop Cosin writes: "First, I conceive that the power of ordination was restrained to Bishops rather by Apostolic practice, and the perpetual customs and canons of the Church, than by any absolute precept, that Christ or His Apostles gave about it; nor can I yet meet with any convincing argument to set it upon a more high and Divine institution. From which customs and laws of the Universal Church, (therein following the example of the Apostles,) though I reckon it to be a great presumption and fault for any particular Church to recede, and may truly say that fieri non oportuit, (when the college of mere presbyters shall ordain and make a priest,) yet I cannot so peremptorily say that factum

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(1) Episcopacy by Divine Right asserted, Part II. Proofs, s. 15, (vol. x. p. 228, ed. 1837).

(2) Field, Of the Church, Book 5, Ch. 27 (vol. iii. p. 217, ed. 1850). See also Ibid., Book 3, Ch. 39; Book 5, Ch. 56.

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non valet and pronounce the ordination to be utterly void. For as in the case of Baptism, we take just exception against a layman or a woman that presumes to give it, and may as justly punish them by the censures of the Church wherein they live for taking upon them to do that office which was never committed unto them; yet if once they have done it, we make not their act and administration of Baptism void, nor presume we to iterate the sacrament after them—so may it well be in the case of ordination . . . ." (1)

Hooker, after referring to what he calls "extraordinary kinds of vocation," for example, direct divine mission or "exigency of necessity where the Church must needs have some ordained and neither hath or can have possibly a bishop to ordain," writes: "These cases of inevitable necessity excepted, none may ordain but only bishops: by the imposition of their hands it is that the Church giveth power and order, both unto presbyters and deacons." (2)

Dean Goode, the learned author of the Divine Rule of Faith and Practice, published in 1842, deals fully with the whole subject, giving a long catena of authorities in support of the view that episcopacy belongs rather to the de bene esse than to the esse of the Church, and in defence of the non-episcopal churches abroad. But with regard to the voluntary assumption by a presbyter of the bishop's function of ordination, he writes thus: "And as it respects the important point of ordination, let us observe that the language used in these Epistles" [to Timothy and Titus] "shews that it belonged exclusively to them" [presidents or bishops] "to ordain, not merely from the charge of ordination being expressly delivered to them alone, but from the power given them over the presbyters, which renders it absurd to suppose that the presbyters then might of themselves appoint others to be presbyters, and thus have the power of introducing any teachers they please into the Church." (3)

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(1) Letter to Mr. Cordell, Cosin's Works (Library of Anglo-Catholic Theology), vol. iv. p. 402.

(2) Hooker, Ecclesiastical Polity, Book 7, Ch. 14, s. 11. See also Ibid., Book 7, Ch. 6, s. 3.

(3) Goode, Divine Rule of Faith and Practice, vol. ii. p. 263, ed. 1842. See also Ibid., vol. ii. pp. 70—72.

Lastly, as reliance has been placed on Bishop Lightfoot's well-known Essay on the Christian Ministry, as if it somehow supported Mr. Fillingham's proceedings, it may be well to point out that it in fact condemns them. The Bishop writes: "As a general rule, however, even those writers who maintain a substantial identity in the offices of the Bishop and presbyter reserve the power of ordaining to the former. This distinction in fact may be regarded as a settled maxim of Church polity in the fourth and later centuries." (1)

I have made these quotations to shew that the views of ecclesiastical polity on which Mr. Fillingham relies as some justification of his acts are entirely inadequate for the purpose. The authorities he cites repudiate in advance the inference he desires to draw from their statements of early Christian history, and it is plain that there is no necessary or reasonable connection between those views and his acts. It is hardly open to doubt that every English divine mentioned by Mr. Fillingham's counsel, if his opinion could have been asked, would have unhesitatingly condemned his conduct.

I am happy to say that Mr. Fillingham's offence is one in respect of which it has rarely, if ever, been needful to adjudicate in the Ecclesiastical Courts in England since the Reformation. I know of no precedent, and for that reason I have deemed it necessary to consider the case on principle instead of authority. But the canon law has by no means ignored the question. That the giving of orders is a function reserved to the bishop is laid down in the Apostolic Canons, the Ethiopic Statutes of the Apostles, and in the Canons of many Councils. But for English authority it is enough to refer to the Provincial Constitutions of Archbishop Walter Reynolds, "De sacramento ordinis et de examinatione." It begins with these words, "Cum quanta reverentia et cordis contritione ac animi devotione ad sacramentum ordinis sit accedendum, ex eo patet, quod non nisi a summo sacerdote, i.e. Episcopo, confertur." (2)

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(1) Lightfoot, Essay on the Christian Ministry [bound up with the Epistle to the Philippians], p. 233; Dissertations on the Apostolic Age (1890), p. 197.

(2) Lyndwood, Provinciale (ed. 1679), Appendix 39.

John of Athon in his "Notes on the Legatine Constitutions" writes: "Unde Collatio Ordinis reservatur Majoribus, scil. Episcopis de Jure Communi." (1)

Further, though I cannot find the point dealt with in any of the English Constitutions, it is clear that, according to canon law in Western Christendom, clergy who presumed to exercise the function of an order to which they did not belong became "irregular."

Irregularity is used here in the technical sense of a canonical impediment which prevents a person being ordained, or if already in orders, from promotion to a higher order and from further exercise of that he possesses. (2) The result was a total suspension from the ministry for a period which might last for many years or for life. The general rule is thus stated in the Corpus Juris Canonici: "Si quis baptizaverit aut aliquod divinum officium exercuerit non ordinatus, propter temeritatem abjiciatur de ecclesia, et nunquam ordinetur." (3)

It will be seen, therefore, that the Church of England has at all times recognized the capital importance to religion of a careful choice of ordained ministers, and has sternly reproved the rash temerity of those who, without authority, would venture to take this great responsibility on themselves. At the outset of the Christian Church St. Paul enjoined Timothy to "lay hands suddenly on no man." There can possibly be no greater offence against the order of any Christian body than for one of the members deliberately to break through the rules made to safeguard the choice and selection of fit persons to serve in the ministry. If they were suffered to be set aside by individuals at their pleasure, it is obvious that not only the discipline, but even the organized continuance of the body would be in the greatest peril. In Mr. Fillingham's case the gravity of

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(1) John of Athon on the Legatine Constitutions, p. 16 (Constitutio Domini Othonis, p. 16, note to Dignius), in Lyndwood's Provinciale (ed. 1679).

(2) Van Espen, Jus Ecclesiasticum Universum, pt. ii., s. 1, tit. x., cap. 1, § v.

(3) Decretal of Pope Gregory IX. lib. 5, tit. xxviii.; De clerico non ordinato ministrante, cap. 1, si quis, etc. [X., v., 28, 1]. [The summary or head-note of this chapter is as follows: "Clericus, ministrans in pertinentibus ad ordinem, quem non habet, deponendus est et amplius non ordinandus."]

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the offence is increased by the fact that he is a beneficed incumbent of the Church of England. I very much regret that Mr. Fillingham should have rendered these proceedings inevitable by retaining his benefice, and at the same time persisting in his claim to commit, and I suppose to repeat, the acts with which he is charged. If, after giving the matter the consideration for which the lapse of time has afforded full opportunity, he had come forward to admit that he had placed himself in an indefensible position and to express regret for his fault, if even now this became his attitude, I should regard the case as one requiring the infliction of a real censure, but not of censure in its severest form. If, on the other hand, Mr. Fillingham, finding himself unable any longer to accept the order and rule of the Church of England in a most important matter, had detached himself from its service by resigning his living and renouncing connection with the Church of England, he would not only have been free of these proceedings but he might even have deserved the respect which sacrifices made for conscience' sake ought to evoke. He would have freed himself from an impossible position in an honourable way. Unfortunately, he has taken neither of these steps, but on the contrary claims both to retain his benefice and also to persevere in a course which, if the foregoing observations are well founded, is subversive of all ecclesiastical polity, and is in deliberate rebellion against the laws of the Church with reference to a matter of first-rate importance. His offence is aggravated by his disobedience to the monition of the Bishop of St. Albans, who required no more of Mr. Fillingham than that he should obey the law as I have stated it. Contumacy is an ecclesiastical offence in itself, and it has been so treated in these proceedings by the promoter. But it is also a circumstance, in the transaction of the pretended ordination, which materially adds to Mr. Fillingham's responsibility for the greater offence. I treat the one as merged in the other. For the same reason, I pass over the undoubted offence Mr. Fillingham has committed by officiating and administering Holy Communion outside his own cure of souls notwithstanding the Bishop's prohibition: *Smith* v. *Lovegrove*. (1) There is no doubt that by so doing he committed a substantial and not merely a technical breach of the law, of which, if it stood alone, I should be bound to take serious notice. But in this case the principal offence with which this minor one is combined completely overshadows it.

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(1) 2 Lee, 162, at p. 171.

As I have said, Mr. Fillingham's position as vicar of Hexton and his claim to set aside the rule of the Church of England as to the choice and admission of its ministers are incompatible. I regret exceedingly that the matter has to be dealt with by way of sentence in this Court, but since it is so I am clear as to the course I ought to follow.

Deprivation stands on the same footing as the other censures of the Church, and will be inflicted in any case of a distinct ecclesiastical offence which in the judgment of the Court is of a sufficiently serious character in itself, or which is attended with sufficient circumstances of aggravation to require it: *Caudrey's Case* (1); *Coombe* v. *De la Bere.* (2)

I do not propose to enter into a discussion of the authorities bearing on deprivation, because that has already been done most thoroughly in the case last cited, and there has never been any real uncertainty as to the correctness of the view there enunciated, at any rate since *Caudrey's Case.* (1) I entertain no doubt that an incumbent advisedly and definitely adhering to the position which Mr. Fillingham has taken up cannot be suffered to retain his benefice. Mr. Fillingham has acted so deliberately and after such ample warning, and has, since his offence was committed, insisted with so much determination that his act was right, that I am, perhaps, scarcely doing him justice in supposing it possible that he will now recede from the position that he has hitherto taken up. I think, however, I ought to give him, at any rate, an opportunity of reconsideration after he is in possession of the judgment I am now giving. Although the principles involved seem to me clear, and even elementary, it would be true to say that Mr. Fillingham has not till to-day been able to review his conduct in the light of a judgment of any Church Court. Offences of this nature differ from very grave moral offences in this, that they are not so irretrievable in their results on the reputation of the guilty person. The Court ought to be

(1) 5 Rep. 1.

(2) 6 P. D. 157.

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satisfied that the defendant is incorrigible before it actually passes sentence of deprivation in respect of matters of false doctrine, heresy, or schism. Where a clergyman maintains doctrines repugnant to the Thirty-nine Articles he is to be deprived, but only "if he persist therein." An opportunity "to revoke his error" is secured to him by statute (13 Eliz. c. 12). Mr. Fillingham's offence is of a somewhat similar character, and I propose to treat him in the same way. I shall adjourn the further hearing of this case for a fortnight. If nothing occurs to alter the position in the interval I shall then pronounce sentence of deprivation on Mr. Fillingham and condemn him in the costs of these proceedings. If during the interval Mr. Fillingham satisfies me in writing that he frankly admits and regrets his error and that he will not attempt to repeat it, I shall not pronounce sentence of deprivation but such other sentence as the altered circumstances may seem to the Court to require.

Feb. 27, 1906. The suit was again called on, and the Court delivered the following judgment:—

THE DEAN OF THE ARCHES. I have received a letter from Mr. Fillingham, in which he states that he has come to the conclusion that he ought to submit himself to the Court. After giving the reasons which have influenced him in taking this course, he writes in the letter in question as follows: "When I ordained Mr. White I did not know I was doing an illegal thing; no such case, as your Lordship has pointed out, having arisen since the Reformation. Now that the Court has decided what the law in the matter is, it would be utterly wrong for me to set up my own judgment against that of authority. Your Lordship has decided what is the mind of the Church of England in this matter. I therefore humbly bow to that decision, frankly admit and regret my error, and I promise that I will not attempt to repeat it." Mr. Fillingham added that his submission is not to be taken as any pledge that he will cease "co-operation with our sister Protestant Churches in this country and America in fighting the danger of priestcraft" and in endeavouring to bring about the union of all those Christian bodies.

I am glad to be able to say that Mr. Fillingham's submission

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relieves me from the necessity of depriving him of his benefice. But I think his wrongful act must be the subject of "ecclesiastical censure," and that the sentence to be pronounced against him cannot be other than severe. He has been guilty of an outrageous offence against the Constitution of the Church of England in a very important particular. I note that he says that he did not know at the time of the commission of the offence that his acts were unlawful, but I think that as a man of mature age and good understanding he ought to have known that his acts were wrong. Further, his offences have been aggravated by persistent contumacy toward the bishop of the diocese, and they have caused scandal which is notorious. Under these circumstances I suspend Mr. Fillingham ab officio et beneficio for two years. I admonish him not to offend again, either by repeating his act of so-called ordination or of contumacy against the lawful commands of the Bishop of St. Albans or of intrusion into parishes of the diocese of St. Albans other than his own by officiating or preaching therein without the bishop's licence. The suspension is to be published in the usual way at Hexton, on Sunday, March 11 next, and will run from that date. Mr. Fillingham must pay the costs of the promoter in this suit. I think I ought, in fairness to Mr. Fillingham, and in order to prevent any misconception, to inform him that disobedience to the monition which will be issued in accordance with my judgment, if brought to the notice of the Court on motion in a summary way without any fresh suit, can be, and probably would be, dealt with by the infliction of an even severer sentence than a suspension of two years. I hope and expect that no occasion for such action will arise, but as the practice of the Court in this respect has not always been understood I deem it right to mention the matter. (1)

Solicitors for promoter: *Day & Son.*

Solicitor for defendant: *Othen.*

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(1) See *Mackonochie* v. *Lord Penzance*, (1881) 6 App. Cas. 424, and *Martin* v. *Mackonochie* (3rd suit), (1882) 7 P. D. 94, 99; and as to the institution of a separate suit by letters of request where the contumacy is aggravated by new and substantive offences, *Martin* v. *Mackonochie* (3rd suit), (1880) 6 P. D. 87; (1882) 7 P. D. 94, 99; (1883) 8 P. D. 191.

C. F. J.

DODD *v.* DODD.

1905
Dec. 19.
1906
March 19;
April 27.

Divorce—Petition by Wife—Desertion and Adultery—Subsisting Order against Husband under the Summary Jurisdiction (Married Women) Act, 1895 (58 *& 59 Vict. c.* 39), *s.* 5, *sub-s.* (*a*)*—Effect of Separation Orders under that Act.*

A wife who takes a separation order under the Summary Jurisdiction (Married Women) Act, 1895, within two years from the time when desertion commenced, cannot subsequently, after the expiration of the two years, allege that her husband has deserted her for the space of two years and upwards without reasonable excuse, so as to constitute the offence contemplated by the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85).

So *held* by Sir Gorell Barnes, President, disagreeing with *Smith* v. *Smith*, [1905] P. 249.

Wife's petition for dissolution of marriage on the grounds of desertion and adultery.

The parties were married in 1891 and separated in August, 1896, owing to the husband's intemperate habits and his neglect to provide reasonable maintenance for his wife and child.

On September 9, 1896, the wife obtained an order for separation and maintenance under the Summary Jurisdiction (Married Women) Act, 1895.

The husband failed to pay the allowance provided by the order, and in the year 1905 he committed adultery.

The wife then presented this petition, which was undefended, and the adultery was proved to the satisfaction of the Court.

W. O. Willis, for the petitioner. This case is covered by the considered judgment of Bargrave Deane J. in *Smith* v. *Smith*. (1) *Levy* v. *Levy* (2), before the late President, was to the same effect.

Sir Gorell Barnes, President. How can a husband be guilty of desertion when his wife has obtained an order which is still on foot and which debars him from returning to her? I had occasion to consider a similar question in *Kay* v. *Kay*. (3) I am

(1) [1905] P. 249.
(2) (1904) 21 Times L. R. 157.
(3) [1904] P. 382.

satisfied as to the adultery, but, under the provisions of the Matrimonial Causes Act, 1860 (23 & 24 Vict. c. 144), s. 5, I shall send the papers to the King's Proctor, so that I may hear an argument on the other side as to the effect of the order on this plea of desertion.

1906. March 19. *Sir J. Lawson Walton, A.-G.*, and *Lowenthal*, for the King's Proctor. The Act of 1895 was intended for the benefit of married women, not for the restriction of their rights. The Legislature did not intend, by creating a summary remedy, to debar an injured wife from claiming the larger measure of relief which this Court alone can grant. The desertion contemplated by the Act of 1895 is distinct from the desertion recognized by the Matrimonial Causes Acts. As to the provision in s. 5, sub-s. (*a*), of the Act of 1895, that an order under that Act is to have the effect of a decree of judicial separation on the ground of cruelty, it is to be noted that s. 4 is silent as to relieving the husband from his legal liabilities, and under s. 5, sub-s. (*a*), the order is not a divorce a mensa et thoro, but merely relieves the wife from her obligation to cohabit with her husband. The meaning and effect of the provision that the order is to have the same effect as a decree of judicial separation is that the wife, on proof of her husband's adultery, shall be entitled to have her marriage dissolved on petitioning this Court for that purpose. It is only reasonable to suppose that the intention of the Legislature in passing the Act of 1895 was to dispense with the minimum period of two years in the case of applicants for divorce from the poorer classes, and to substitute for that minimum period of actual desertion the finding of fact by a Court of summary jurisdiction of an intention on the part of a husband to desert his wife. There is, however, no inference to be drawn, as there would be after a decree of judicial separation in this Court, that the husband is not to be received back again if he behave himself. It is very important to note that a judicial separation on the ground of cruelty is referred to, not on the ground of desertion.

[SIR GORELL BARNES, PRESIDENT. Is not the test whether the wife could get a decree for restitution of conjugal rights while the magistrate's order is on foot? The inclusion in the order of the provision of sub-s. (*a*) is optional merely. To make the husband's conduct amount to desertion a state of things must exist which he could put an end to.]

The Act of 1895 is merely an expansion of the Acts of 1878, (41 & 42 Vict. c. 19) and 1886 (49 & 50 Vict. c. 52). The former of these dealt with cruelty only, while the latter, though dealing with desertion, merely prescribed payments. Neither of these two acts contemplated the cutting down of the relief obtainable in this Court; nor does the Act of 1895 so contemplate.

W. O. Willis, for the petitioner.

Cur. adv. vult.

April 27. SIR GORELL BARNES, PRESIDENT, delivered the following written judgment:—This is a suit for divorce by the petitioner, a wife, in an undefended case on the alleged grounds of her husband's adultery and desertion without reasonable excuse for two years and upwards. The case originally came before me on December 19 last, when evidence of the facts was given and the adultery was established by the evidence. But the facts with regard to the desertion have given rise to a question of importance—of importance, indeed, far beyond that which is at first sight apparent. Having regard to this, and to the fact that there have been two undefended cases, viz., *Levy* v. *Levy* (1) and *Smith* v. *Smith* (2), in each of which a similar point was raised to that which causes the present difficulty, and in each of which the point was disposed of without the Court having the advantage of an opposing argument, I thought it desirable to take advantage of the provisions of s. 5 of the Matrimonial Causes Act, 1860, by directing that the papers in the matter should be sent to the King's Proctor, in order that he might instruct counsel to argue the case before the Court. Accordingly, on March 19 last, the case was again considered before me, the Attorney-General arguing on behalf of the King's Proctor and the petitioner's counsel also being heard.

The facts necessary to state in order that the point may be appreciated are as follows:—On March 26, 1891, the petitioner was married to the respondent, a provision merchant

(1) 21 Times L. R. 157.

(2) [1905] P. 249.

of Manchester. There was one child of the marriage, born in 1892. In the year 1896 it appears that the husband had given way to drink, had lost his business, and, though living with his wife, was neglecting to provide for her and the child, and was being kept by her; and, in consequence, on August 21 in that year the petitioner left him and went to her mother. In the following month of September the petitioner applied to the stipendiary magistrate at Manchester under the provisions of the Summary Jurisdiction (Married Women) Act, 1895, complaining that her husband had been guilty of wilful neglect to provide reasonable maintenance for her and her infant child, and that by such neglect the respondent had caused her to leave and live separately and apart from him, and she sought to obtain an order under the provisions of that Act. On September 9 1896, the stipendiary magistrate made an order, from which it appears that the respondent appeared, and that it was ordered that the petitioner should be no longer bound to cohabit with her husband, that the legal custody of the child should be given to the petitioner, and that the respondent should pay to the petitioner a weekly sum of 10*s.*, and 6*s.* 6*d.* for the petitioner's costs.

The respondent did not pay anything under the order, and the petitioner accordingly took steps to enforce it by summoning the respondent two or three times, but no payment was in fact made by him; and since that time the petitioner has been living with her mother. On August 5, 1905, the petitioner, having ascertained, as she alleged, that her husband had been guilty of adultery, filed her petition in the present suit to obtain a decree of divorce on the grounds aforesaid.

From the date of the magistrate's order it appears that the petitioner had not had any communication with her husband.

The evidence satisfied me that the adultery on the part of the respondent was established, and therefore the right of the petitioner to succeed in the present petition depends upon whether there has been desertion on the part of the respondent for two years and upwards. The separation between the parties having taken place in 1896, far more than two years have elapsed since that date up to the commencement of the present suit; but two questions arise, viz., whether the evidence shewed any desertion on the part of the respondent, and, if it did, what was the effect of the magistrate's order of September, 1896.

With regard to the first point, I have had the opportunity since the arguments were heard of reading the shorthand notes of the evidence taken in the case, and possibly because the papers had been sent to the King's Proctor with the intention of directing his attention to the general legal question raised, and the arguments before me were confined to that question, I had not, until I had read the notes, sufficiently appreciated this point. It had been rather assumed that the Court would find, from the whole of the facts given in evidence, that there had been desertion by the respondent in accordance with the principles laid down in *Sickert* v. *Sickert* (1), where I held that desertion is not to be tested by merely ascertaining which party left the matrimonial home first, and that the one who intends bringing the cohabitation to an end commits the act of desertion. But I am satisfied, upon the evidence in this case, that the husband had no intention of bringing the cohabitation to an end. He was, in fact, living upon his wife, who was keeping him, and no doubt desirous of remaining with her; but as he was drinking and doing no work she left him. She did not summon him for desertion, but for neglect to maintain; in fact, she wanted to get rid of him, and did so. I find, therefore, that the husband was not guilty of desertion for two years and upwards, or at all; and that is really sufficient to dispose of the case. It is not, as a rule, wise to express any opinion on points which are not strictly necessary to the decision of a case; but having regard to the fact that this case has been argued by the Attorney-General for the King's Proctor with the object of obtaining a decision upon the legal question supposed to have been raised and of reviewing the decisions in the two undefended cases above-mentioned, and to the fact that the point is sure to come up again when it might not be convenient to have it argued as this case has been, and to the advantage which it may be to the magistrates throughout the country to have the opinion of this Court upon the matter, I have decided to express the opinion I have formed as to the effect of the magistrate's order.

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(1) [1899] P. 278.

Desertion contemplated by the Act of 1857 must be desertion without reasonable excuse for two years or upwards, and in order to maintain desertion throughout that period there must be in fact a state of things which keeps up the desertion throughout the whole of that period. I have so held in the case of *Kay* v. *Kay*. (1) That was a case in which a supplemental petition, alleging desertion for two years and upwards, had been filed; but the desertion found did not occur as much as two years prior to the date of the original petition, and it was held that the filing or prosecution of a suit for dissolution of marriage precluded the petitioner from successfully pleading that the period of desertion was running during the time when the suit was being maintained, as nothing had happened to entitle the wife to refuse to return to the husband, if he had desired to put an end to the desertion; and the petitioner had put it out of the power of the respondent to do anything, and could not be held entitled to treat him as continuing to desert her. Therefore the question I am now considering in this case is whether, when the two years had not been completed at the time of the magistrate's order, that order had the effect of preventing the desertion continuing after the date of the order.

But first there is a technical point to dispose of which was not taken by the Attorney-General, no doubt because he was concerned with the broad legal question, nor pressed, so far as I recollect, by the petitioner's counsel—that, having regard to the form of the order in this case, it might be treated as a nullity because it might be considered as bad on the face of it. The order does not state upon its face the finding of fact upon which the order was made—in other words, it does not state on the face of it that the respondent had been guilty of wilful neglect to provide reasonable maintenance for the petitioner and her child, and that by such neglect he had caused her to leave and live separately and apart from him. It might be said that I could therefore ignore the order and treat it as if it had never been applied for and made, on the general principle that a magistrate's order ought to state the finding of fact essential to the exercise of the jurisdiction: see the observations in the case of *Brown* v.

(1) [1904] P. 382.

Brown (1); but it is necessary to observe, first, that this point is highly technical, and, on an appeal to this Division, the defect could have been corrected, that the petitioner acted upon the order and endeavoured to enforce it, and that it was undoubtedly treated by both parties as being an effective order, and further, that in the case of *Brown* v. *Brown* (1) the effect of the provisions of the Summary Jurisdiction Acts and of the forms which are provided for use under those Acts was not fully considered. According to s. 8 of the Act of 1895 all applications under it are to be made in accordance with the Summary Jurisdiction Acts, and, without going through the details of those Acts as they at present stand, it is sufficient to observe that the Summary Jurisdiction Rules, 1886, r. 31, provided that the forms in the schedule thereto, or forms to the like effect, might be used with such variations as circumstances might require; and the forms of orders in that schedule omit to state whether the complaint is found and adjudged to be true: so that although in strictness the order ought to state the findings of fact essential to jurisdiction, having regard to the provisions of the Act and Rules to which I have just referred, I am not prepared to hold, without further argument, that this order ought to be treated as bad on the face of it. I might point out, however, that it is desirable that the practice adopted, I believe, by the magistrates in London of stating that the cause of complaint is found to be true is desirable in order to avoid any such difficulty as arises in the present case upon this point: see the discussion of this subject 62 J. P. 563.

Assuming, then, the order to be an operative order, I will first consider the effect of the two cases which have already been decided, viz., *Levy* v. *Levy* (2) and *Smith* v. *Smith*. (3) I have been furnished by the King's Proctor with a transcript of the official shorthand-writer's notes of the case *Levy* v. *Levy* (2), and it is quite clear from a perusal of them that the discussion in that undefended case was of a very short character, and that no considered judgment by Lord St. Helier was given upon the point. With regard to the case of *Smith* v. *Smith* (3), Bargrave

(1) (1898) 62 J. P. 711.
(2) 21 Times L. R. 157.
(3) [1905] P. 249.

Deane J. appears to have come to the conclusion in that case, without having had the benefit of any argument except that on the part of the petitioner, that he could ignore the operation of the order made by the magistrates, as not affecting the jurisdiction of the Court. I agree that the order does not affect the jurisdiction of this Court; but desertion is a question of fact, and if something has taken place which puts an end to the desertion running on, just as, for instance, an agreement to live separate, made after desertion, would do, then the Court cannot find the fact of the necessary desertion for two years or upwards. For the reasons which will appear I do not think I can follow that case after the very full discussion this case has had. In this Court decisions in undefended cases, when the Court has not had the benefit of an argument on both sides, have not been treated as so binding that the Court, when it has the opportunity of a fuller consideration, is compelled to follow them.

To arrive at a conclusion about this matter it is necessary to examine with some care the whole of the legislation affecting the question. According to the Matrimonial Causes Act, 1857, s. 7, no decree for divorce a mensa et thoro was to be made thereunder, but in all cases in which a decree of divorce a mensa et thoro might be pronounced the Court might pronounce a decree for judicial separation which should have the same force and the same consequences as a divorce a mensa et thoro then had. By s. 16 a decree of judicial separation might be obtained either by the husband or wife on the ground of adultery, or cruelty, or desertion without cause for two years or upwards. By s. 17 an application for judicial separation might be made by either the husband or wife by petition to the Divorce Court, and also to the judge of assize. This latter provision was the subject of much discussion at the time, and in the following year, 1858, by s. 19 of the Matrimonial Causes Act of that year, the provision for judicial separation by petition to a judge of assize was repealed, and so matters remained until 1878. By the 4th section of the Matrimonial Causes Act of that year it was provided that if a husband should be convicted summarily or otherwise of an aggravated assault, within the meaning of the statute 24 & 25 Vict. c. 100, s. 43, upon his wife, the Court or magistrate before whom he should be so convicted might, if satisfied that the future safety of the wife was in peril, order that the wife should be no longer bound to cohabit with her husband, and such order should have the same force and effect in all respects as a decree of judicial separation on the ground of cruelty, and that such order might further provide for—(1.) the payment by the husband to the wife of weekly sums, which payments were to be enforced as therein provided, and the Court or magistrates by whom any such order for payment of money should be made should have power from time to time to vary the same on an application by either the husband or wife upon proof that the means of the husband or wife had been altered since the original order, or any subsequent order, varying it, should have been made; and (2.) for giving the custody of the children under ten years of age to the wife: and the said section further provided that any order for payment of money or for custody of the children might be discharged by the Court or magistrate by whom such order was made upon proof that the wife had, since the making thereof, been guilty of adultery. As bearing upon the point under consideration, it is important to notice that the words as to non-cohabitation are the words which are adopted in s. 5, sub-s. (*a*), of the Act of 1895, and that it seems clear that the object of inserting them in the said s. 4 of the Act of 1878 was to make a complete separation between husband and wife because the safety of the wife required it. No power is contained in the section to make an order without this provision, or to vary or discharge that order otherwise than with regard to the payment of money and the custody of the children, and so it would remain in permanent operation, because it originated in the necessity for providing for the future safety of the wife. The contention in the present case on the part of the petitioner is that similar words as to non-cohabitation in the Act of 1895 are to have a totally different construction. The next Act to refer to is the Maintenance in Case of Desertion Act, 1886. According to that Act, a wife might summon her husband for desertion and the justices or magistrates, if satisfied that the husband was able, wholly or in part, to maintain his wife or his wife and family, but wilfully refused or neglected so to do and

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had deserted his wife, might order a weekly payment, which might be afterwards varied or discharged in certain circumstances as therein provided; but the Act contained no power to make a non-cohabitation order in cases of desertion, and the usual form of order made was that the payments should be made so long as desertion continued. Then, coming to the Act of 1895, it is important to notice that that Act is an Act to amend the law relating to the summary jurisdiction of magistrates in reference to married women. It is not an Act which alters, nor do any of its provisions appear to me to affect, the Matrimonial Causes Acts applicable to this Court; nor was it intended to vary, nor does it in fact vary, the causes for which a divorce may be obtained. The 4th section of the Act gives five grounds, for any one of which a married woman may lay a complaint and obtain an order or orders under the Act. Those grounds are these—(1.) where the husband shall have been convicted of an aggravated assault upon her within the meaning of s. 43 of the Offences against the Person Act, 1861; (2.) where the husband shall have been convicted upon an indictment of an assault upon her and sentenced to pay a fine of more than *5l.*, or to a term of imprisonment exceeding two months; (3.) where the husband shall have deserted her; (4.) where the husband shall have been guilty of persistent cruelty to her; and (5.) where he shall have been guilty of wilful neglect to provide reasonable maintenance for her or for her infant children whom he is legally liable to maintain, and in each of such cases, viz., of persistent cruelty or neglect to maintain, shall by such cruelty or neglect have caused her to leave and live separately and apart from him.

Sect. 5 provides that the Court of summary jurisdiction to which any application under the Act is made may make an order or orders containing all or any of the provisions following, viz., (*a*) a provision that the applicant be no longer bound to cohabit with her husband, which provision while in force shall have the force in all respects of a decree of judicial separation on the ground of cruelty; (*b*) a provision as to the custody of children; (*c*) a provision as to weekly payments to the wife, not exceeding *2l.* per week; and (*d*) a provision as to the payment of costs.

Sect. 6 is not material to the present case.

Sect. 7 gives power to the Court, on the application of married women, or of the husband, and upon cause being shewn upon fresh evidence to the satisfaction of the Court at any time, to alter, vary, or discharge any order, and to increase or diminish the amount of the weekly payments, so that the same do not in any case exceed the weekly sum of 2*l.*; but where an order has been made it is very difficult to get rid of, except possibly as to the amount of payment or custody of children: see, as to the meaning of the term "fresh evidence," *Johnson* v. *Johnson.* (1)

It would seem as if the magistrates had not a simple discretion to discharge the original order, and it is very important to observe that the Act appears to contain no provisions expressly empowering the magistrates to make original orders for temporary separation, or of a probationary character, with such conditions and restrictions as might be useful, though such orders might meet the needs of many cases in which time for reflection and amendment might end the trouble.

Sect. 8 provides that all applications under the Act shall be made in accordance with the Summary Jurisdiction Acts.

Sect. 10 gives power to the Court, if in its opinion the matters in question between the parties, or if any of them, may be more conveniently dealt with by the High Court, to refuse to make an order under the Act.

It will be seen that the Act is an amalgamation of the two Acts last referred to. In practice, I believe, since 1895, the difference between cases involving the wife's safety and cases in the nature of desertion or neglect to maintain appears to have been lost sight of, and the orders under the Act of 1895 have been made in a form commencing with the non-cohabitation provision, and following with the others as to custody and payment of an allowance and costs. This ought to be noted, because it is unnecessary, as I will point out more fully later on, in desertion cases or cases, such as the present, of neglect to maintain, that the non-cohabitation provision should be inserted, unless indeed the applicant particularly desires to have it.

It ought also to be noted that the power of magistrates appears

(1) [1900] P. 19.

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to be discretionary. The words are, "the Court may make an order or orders"; the language does not appear to impose upon them an absolute obligation to do so; and however this may be, it is certainly clear that the order may contain all or any of the provisions aforesaid, and, therefore, that only such provisions should be inserted in the order as are necessary to meet the justice of the case.

This, then, brings me to the consideration of what effect is to be given to what I may term the non-cohabitation provision, when it has been inserted in an order. The language of that provision I have above stated. The argument for the petitioner was to the effect that this provision was simply for the wife's protection, and has no effect on the husband's duties, and that, although the wife is no longer bound to cohabit with her husband, yet he is still under the duty to do so if required. But where do these words as to non-cohabitation come from? Clearly, I think, from the Act of 1878, where the object was to provide for the wife's safety and to make her completely free from her husband, as I have already pointed out; and I confess I fail to appreciate the argument that if she be not bound to cohabit, yet he still is. But, further, words are added as follows: "which provision, while in force, shall have the force in all respects of a decree of judicial separation on the ground of cruelty." Now what is the effect of these words? In my opinion their effect is to be gathered from the provisions of ss. 7, 25 and 26 of the Act of 1857, the result of which is that a wife, in a case of judicial separation, is to be considered a feme sole in respect of property which she may acquire, and also for the purposes of contract and wrongs and injuries, and suing and being sued in any civil proceedings. She thus obtains complete protection from her husband, and he can in no way interfere with her.

It was, however, argued that if the non-cohabitation provision is to have in all respects the force of a decree of judicial separation on the ground of cruelty, then a wife having obtained such an order, though there had been no cruelty in fact, nor desertion for two years or upwards by the husband, could at once, upon proof of adultery, sue him for divorce. In my opinion this argument, though ingenious, is entirely unsound. To uphold it would, in effect, be permitting the Act of 1895 to alter the Act of 1857, though the former is only an Act to amend the law relating to the summary jurisdiction of magistrates in reference to married women, and contains no express provision varying or amending the latter Act, and would, in effect, be giving new grounds upon which a divorce could be obtained by a woman.

The argument appears to me to be based upon a misconception. The order is not a decree of judicial separation on the ground of cruelty. It is merely to have the same effects (which are what I have already stated). In cases of cruelty and adultery, if cruelty be proved, a judicial separation may be obtained. If adultery be afterwards proved, the Court, "if satisfied" that both cruelty and adultery have been proved, may grant a decree of divorce: see ss. 27 and 31 of the Act of 1857. The cruelty already found in the judicial separation suit has been proved, and the parties are estopped from disputing this. But how can the Court be satisfied that there has been both cruelty and adultery, if, though adultery be proved, it merely has before it, in addition, a magistrate's order which has no cruelty for its foundation? The Attorney-General, however, went further and suggested that the Act of 1895 was intended to do away with the two years limit in poor cases. I confess I cannot follow this. There is no repeal of this limit, and why should it be allowed in poor cases rather than in other cases? If the Act of 1895 were to have the effect contended for, there would seem to be no reason why any wife deserted by her husband could not apply to the magistrates for a non-cohabitation order and then, upon proof of adultery, get a decree of divorce and maintenance from this Court. The answer is that the powers of this Court to grant a decree of divorce are limited to certain specific causes which the Act of 1895 does not touch. Further, it is important to notice that if a husband refuse to return to his wife, a suit for restitution can be brought, and if a decree be obtained and the respondent fails to comply with it, then, by virtue of the provisions of the Matrimonial Causes Act, 1884, such non-compliance is to have the effect of desertion for two years and upwards so that a suit for judicial separation can then follow; or, if there be adultery as well, a suit for divorce can then at once be maintained.

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This course has been adopted in a great many cases which have come before this Court, and by it the two years limit has, in such cases, been got rid of. In the present case perhaps want of means (though I have no evidence about this) might have hindered the petitioner from taking such a course, though such a suit is an inexpensive matter where not defended, but it is clear from the evidence that the petitioner would not have been likely to take such a course, because it would seem probable that her husband would have been only too glad to come back to her to be kept by her.

It was urged that s. 10 of the Act of 1895 countenances the above suggestion because the magistrates, it was said, have a discretion in making an order, and may refuse to make one; but this cannot depend on the position of the people. It depends expressly on the question of convenience, as, for instance, if the Court of summary jurisdiction cannot grant adequate relief or perhaps has not the means of compelling the necessary evidence.

Lastly, it was urged for the petitioner that to refuse a decree will inflict great hardship upon her. That may be, but she asked for and obtained a non-cohabitation order, which put an end to the desertion; and it is in order to avoid such difficulties in future that it is desirable to consider how this jurisdiction of the magistrates should be exercised in suitable cases.

I have already pointed out that the magistrate's order may contain all or any of the provisions mentioned in s. 5 of the Act of 1895, and it seems most important to consider whether it is desirable that the non-cohabitation provision should be inserted, except in those cases where the wife's safety is involved, or where, for some other reason, it is necessary to insert it. It does not appear to have been necessary to have such a provision under the Desertion Act of 1886, and there seems to be no reason why it should be inserted in mere desertion cases now. This gives rise to the general consideration of the effect of these orders.

Now, at the time when the Act of 1895 was passing through Parliament, it is remarkable that there should have been practically no discussion in either House as to the probable general result and effect of the then proposed legislation. The reports in Hansard, so far as I have been able to find, shew that the Act passed almost without anything being said about it, although it went far beyond being a consolidation Act, and gave power to grant non-cohabitation orders in large classes of cases where it did not exist before. Those who were concerned with it appear to have had their minds, if not entirely yet mainly, on the protection of women rather than on the general effects of the Act and its probable influence on the morality of the country.

The following statistics have an important bearing on the matter under consideration. The numbers of the matrimonial causes heard in this Court were in 1886, 505; in 1896, 609; and in 1903, 743. Very few suits are now brought in this Court for judicial separation. The number of orders made by Courts of summary jurisdiction under the Acts prior to that of 1895 was, in 1895, 1035. The Act of 1895 came into force on January 1, 1896, and in that year the number of separation orders made by the Courts of summary jurisdiction amounted to the large figure of 5399; and the number rose in 1903 to 7292. I have not before me the statistics for 1904 and 1905. The figures for those years will probably be greater and not less. These figures certainly give food for reflection. I can obtain no figures which would shew in what number of cases the parties have come together again. I have sat on most of the appeals under the Act of 1895, and, although no doubt there are many bad cases calling for the exercise of the jurisdiction of the magistrates, I am convinced that the result of the Act has been to cause women in numerous cases to rush off to the Court on slight provocation and to endeavour to make a case sufficient to obtain an order. This view was forcibly expressed in a recent communication to *The Times* by a very experienced metropolitan magistrate. Probably the experience of other magistrates is much the same. I have frequently noticed that the magistrates have done all in their power to reconcile the parties, and have adjourned cases from time to time with this object; and I expect that this has generally been the case, and that the magistrates have, so far as possible, endeavoured to keep these applications within bounds.

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At the same time it may be doubted whether these summary proceedings are suitable for the determination of matters which affect the whole future life of the parties and their children.

There is, further, a broad and very serious ground upon which the operation of these orders is open to question, having regard to the very large extent to which they are being obtained, viz., at the rate of over 7000 a year; so that, at any given time, there must be an extremely large number of people living separate under orders made during the previous years. That ground is, that the direct tendency of these orders appears to be to encourage immorality and to produce deplorable results.

Applied first in an age remote and in a state of society different from the present, the remedy of permanent separation for matrimonial grievances would always seem to have been injudicious, even in days when persons could not escape from their surroundings as they can now, and when they were more amenable to the pressure and censures of the Church, and is now probably to be regarded as more unsatisfactory still and as tending to demoralization and providing inadequate justice to the innocent.

At the time of the Reformation, the Royal Commission issued by Henry VIII. and renewed by Edward VI., composed of ecclesiastics, civilians, and common lawyers, inquired into this subject. The project of reforming the law came to an end with the death of the latter King, but the Commissioners' report was printed in the reign of Elizabeth, under the title "Reformatio Legum Ecclesiasticarum," and the recommendations were to the effect (inter alia) that separation a mensa et thoro should be abolished as productive of great abuses and scandal in the marriage state, and that, while restrictions and punishments should be imposed upon the guilty party, the innocent party should be permitted to obtain a divorce for, among other grounds, desertion: see Reeves' History, 2nd ed. vol. iv. pp. 546, 547, summarizing Ref. Leg. Eccl. 47—56. Desertion is a ground in Scotland and in certain other countries. Nothing, however, was done by the Legislature, and marriage remained indissoluble, except by Act of Parliament, until 1857, when, after much controversy, the Act of that year was passed, which can hardly be held to have attained to finality. By it the right of divorce was given, but confined to the cases specified therein. The remarks of Mr. Bishop, in his work on marriage and divorce (s. 37), on the state of things which existed in England before that Act, are deserving of a most careful perusal. But the figures I have given above shew the limited application of this Act, especially having regard to the great increase in the population of this country, and the applications under the Summary Jurisdiction Act appear to be made partly for want of means to bring the case before this Court and partly because the causes for orders effecting permanent separation are wider than the causes for granting a divorce.

That the tendency of these orders is to encourage immorality, bearing in mind that human nature is what it is, and the classes of persons with whom the magistrates usually have to deal, I doubt whether anyone, of experience sufficient to judge, will deny. That is the opinion which I have formed after a long experience in this Court, where case after case shews what so often follows from these orders, and discloses a most unsatisfactory state of things. It is an opinion in accord with that expressed in very forcible language by Mr. Bishop on the subject of divorce a mensa et thoro, s. 29, where he collects the opinions of certain distinguished writers on the subject.

The provisions of the German Civil Code, 1564—1576, and the French Code may be carefully studied as bearing upon the subject under consideration, especially those which relate to the powers as to turning a decree of judicial separation into a decree of divorce.

I will first observe that these separation orders can only be obtained by a wife, except in the one case recently provided for by the Licensing Act of 1902, when a wife is a habitual drunkard as defined by the Habitual Drunkards Act, 1879 (a case, by the way, difficult of proof, having regard to the definition there given); and it is most remarkable that in the present state of the law, while, on the one hand, it is more difficult for a woman to procure a divorce than for a man, because she must prove adultery and one of certain other offences, whereas he has only to prove adultery, yet, on the other hand, she can obtain a separation order from the magistrates for the causes specified in the Act of 1895, but he can obtain no order at all, however unbearable his life may have become from his wife's drunkenness (short of her becoming a habitual drunkard within the meaning of the aforesaid Act), violence, desertion or other cause.

Moreover, these orders really impose a more serious penalty in the cases to which they apply than a decree of divorce would; for the result of a decree of judicial separation against a man is more severe to him, and in certain cases even to a woman, than a decree of divorce. The consequences of each are, in most cases, very much the same, except that the former imposes the disability of re-marriage while the latter does not; so that, for instance, a man may be more severely punished for the offence of adultery than for the same offence coupled with cruelty or desertion for two years or upwards; and, further, in the latter case, the wife has the option of choosing whether she shall apply for separation or divorce.

With regard to the orders obtained by wives against husbands, case after case in this Court shews that, rather than pay the allowance ordered, the man goes elsewhere, either to another town, or to America, or to the Colonies, and forms other ties almost as a matter of course.

Again, a very frequent case in this Court is where a wife by her own behaviour, such as drunkenness, violence, and neglect of home and children, causes her husband to leave her. She then takes out a summons against him for desertion; he appears, and agrees to pay so much per week rather than go back. She is found misconducting herself, as might be expected; he sues for a divorce and asks the Court to exercise its discretion in his favour, notwithstanding that he had left her.

These are illustrations, and are only brought to notice in this Court when there is money enough for one of the parties to sue for a divorce. It is easy to guess at the state of things in the mass of cases where there are not sufficient means for this purpose, or where both parties are guilty of similar offences.

I am anxious not to travel out of my province, which is jus dicere non jus dare, but the point as to how the Act of 1895 can be administered, with regard to the non-cohabitation part of the order, by the magistrates who have, as noticed above, certain discretionary powers and can to a certain extent control the working of the Act so as to prevent, as far as possible, evil results, gives rise to the foregoing general observations; and having, since I first sat on this bench in 1892, found it necessary to make myself familiar with the history of the laws governing the relations of husband and wife, and the discussions which have from time to time taken place relating thereto, more particularly at the time of the passing of the Act of 1857, and the results of those laws, of which experience in this Court gives very considerable opportunities of judging, it is desirable, in my judgment, as bearing on the subject under consideration, to express the conviction, which has forced itself upon me, that permanent separation without divorce has a distinct tendency to encourage immorality and is an unsatisfactory remedy to apply to the evils which it is supposed to prevent.

That the present state of the English law of divorce and separation is not satisfactory can hardly be doubted. The law is full of inconsistencies, anomalies, and inequalities amounting almost to absurdities; and it does not produce desirable results in certain important respects. Whether any, and what, remedy should be applied raises extremely difficult questions, the importance of which can hardly be over-estimated, for they touch the basis on which society rests, the principle of marriage being the fundamental basis upon which this and other civilized nations have built up their social systems; and it would be most detrimental to the best interests of family life, society, and the State to permit of divorces being lightly and easily obtained, or to allow any law which was wide enough to militate by its laxity against the principles of marriage. It is not necessary for me now to express a formal and final opinion upon these serious questions but the consideration of what I have found it necessary to deal with in this judgment brings prominently forward the question whether, assuming that divorce is to be allowed at all, as it has been in England by judicial decree for the past fifty years and for a long time before that by Act of Parliament, any reform would be effective and adequate which did not abolish permanent separation, as distinguished from divorce, place the sexes on an equality as regards offence and relief, and permit a decree being obtained for such definite grave causes of offence as render future cohabitation impracticable and frustrate the object of marriage; and whether such reform would not largely tend to greater propriety and enhance that respect for the sanctity of the marriage tie which is so essential in the best interests of society and the State. It is sufficient at present to say that, from what I have pointed out, there appears to be good reason for reform, and that probably it would be found that it should be in the direction above indicated. The petition for divorce in this case must be dismissed, for the wife has only proved adultery, and that is not sufficient to enable her to obtain a decree of divorce; and it will not be any satisfaction to her to know that if her case had arisen and her suit could have been brought in Scotland or most other civilized countries, she would have succeeded.

Solicitors for petitioner: *Crowders, Vizard, Oldham & Co., agents for J. Hislop, Manchester.*

The King's Proctor.

H. D. G.

[IN THE COURT OF APPEAL.]

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March 17, 19, 20, 30.

BATER *v.* BATER, OTHERWISE LOWE.

International Law—Divorce—Judgment in rem—Foreign Court—Domicil—Jurisdiction—American Law—Residence—English Marriage—Decree of Divorce by New York Court—Validity of Divorce in England.

A divorce granted by a foreign Court, being a judgment affecting the status of the parties, stands on the same footing as a judgment in rem, and therefore cannot be set aside in this country, even on the ground of fraud, by a person who was no party to the proceedings in which the judgment was pronounced.

Castrique v. *Behrens*, (1861) 30 L. J. (Q.B.) 163, approved.

The domicil for the time being of the married pair, when the question of divorce arises, affords the only true test of jurisdiction to dissolve their marriage; and the Court of the bona fide existing domicil has jurisdiction over persons originally domiciled in another country to undo a marriage solemnized in that other country; and such a divorce will be recognized by the English Courts even if granted for a cause which would not have been sufficient to obtain a divorce in England.

Harvey v. *Farnie*, (1882) 8 App. Cas. 43, and *Le Mesurier* v. *Le Mesurier*, [1895] A. C. 517, applied.

The resolution of the judges in *Lolley's Case*, (1812) Russ. & Ry. 237, must be treated as confined to the particular facts of the case in which it was given.

In 1880 a marriage was celebrated in England between two English persons. In 1886 the husband commenced divorce proceedings against the wife for adultery with B., which failed upon proof of the husband's cruelty, and in 1889 he sailed for New York, where he lived in adultery with another woman and acquired a domicil in the State of New York. The wife and B. continued to live in adultery, and in 1890 the wife went to New York for the purpose of obtaining a divorce, and subsequently obtained a decree from the New York Court for dissolution of her marriage on the ground of her husband's adultery. There was no collusion between the husband and wife, but her matrimonial misconduct in England was not disclosed to the New York Court. In 1893 the wife went through a ceremony of marriage with B. in New York, which, assuming they were then at liberty to marry, was a valid ceremony. In 1903 B. presented a petition for a declaration of nullity of the New York marriage:—

Held that, both according to the law of the State of New York and of England, the New York Court had jurisdiction to decree a divorce, as the husband had acquired a domicil in New York, the adultery complained of by the wife was committed in that State, and the wife had elected to make the domicil of the husband her own for the purpose of the divorce proceedings, and had acquired a "residence" there according to the law of New York, and consequently that the petition must be dismissed.

Decision of the President (Sir Gorell Barnes) affirmed.

THIS was an appeal from a decision of the President which raised the question as to the jurisdiction of the New York Court to dissolve a marriage solemnized in England between two English persons.

The facts as found by the Court were as follows:—

In November, 1880, Catherine Lowe, formerly Wilkinson, married Francis William Lowe, at the parish church, West Derby, Lancashire. At this time both parties were English and domiciled in England.

In 1886 Francis William Lowe instituted divorce proceedings against his wife, charging her with adultery with Thomas Bater, the present petitioner. The wife presented a cross petition charging her husband with cruelty. At the trial of the suits, in June, 1886, both petitions were dismissed, the respondent and co-respondent having been found guilty of adultery, and the petitioner of cruelty. F. W. Lowe thereupon sailed for New York and lived in that State in adultery with a woman named Chamberlain, and he acquired a domicil in the State of New York. The respondent and co-respondent were meanwhile living together in Liverpool, but she, becoming dissatisfied with her position and desiring, if possible, to be married to the co-respondent, arranged with him that she should go over and institute divorce proceedings in New York, notwithstanding what had already taken place in this country. Accordingly she went to New York, with money provided by the co-respondent, with the idea that if she were successful in her suit she would return to this country and marry the co-respondent—that is, the present petitioner—but if she failed she intended to remain in America and endeavour to earn her own living. She had no difficulty in establishing her husband's adultery to the satisfaction of the New York Courts, and on May 14, 1890, she obtained a decree for dissolution of her marriage upon that ground, her husband having been previously duly served, but having taken no part in the proceedings. The divorce proceedings in this country were not disclosed to the New York Courts, and it was stated that had they been disclosed, Mrs. Lowe, according to the New York Code of Civil Procedure, would not have obtained relief, as she herself had been guilty of adultery. On her return to this country a case was laid before counsel as to whether she and the present petitioner could marry. He advised that it was not safe to do so, and, acting on this advice, Thomas Bater and Mrs. Lowe resolved not to run the risk of a marriage in this country, but to get married in New York. There, accordingly, on December 26, 1893, they went through a ceremony of marriage which, assuming they were at liberty to marry, was a valid ceremony. They lived together for six months, and after that they associated together for six months. Then they separated; and in August, 1903—ten years after the marriage ceremony—the petitioner commenced this suit claiming a declaration that the marriage solemnized between himself and Catherine Bater, otherwise Lowe, née Wilkinson, at New York City on December 26, 1893, was null and void on the ground that her husband, Francis William Lowe, was still alive.

The question before the Court to a great extent depended upon the proper construction to be placed on several sections of the Code of Civil Procedure of the State of New York (hereinafter referred to as the "New York Code") applicable to this particular case, and on this point the evidence of several American lawyers, who were called as witnesses, was conflicting. The material sections of the New York Code, the effect of the expert evidence, and the conclusions drawn from it by the Court, are sufficiently quoted and stated in the judgment of the President.

Duke, *K.C.*, and *Grazebrook*, for the petitioner.

M. Shearman, *K.C.*, and *Barnard*, for the respondent, the wife.

THE PRESIDENT (SIR GORELL BARNES), after some observations as to the difficulty the Court had been placed in owing to the conflicting evidence of the American lawyers as to the law of the State of New York, said he would have wished to have prepared a more considered judgment, but having regard to the view he was taking of the case he did not think it necessary to reserve it, but that he gave it with this reservation, that the view he was expressing was the one that struck him at the moment. His Lordship then stated the facts, and continued:—It is said that the first marriage of Mrs. Lowe had been dissolved by a Court of competent jurisdiction in the State of New York prior to her marriage with Mr. Bater, and that therefore she was free to marry. On the other side it is said that the proceedings in New York had not had the effect, when they are examined, of dissolving her marriage, and therefore she still remained the wife of Mr. Lowe (that is the petitioner's case), and therefore his marriage with her is bad. Her case is that she was properly divorced, that the marriage with Bater was good, and that therefore this suit is not properly founded. The question, therefore, in this case depends, as counsel have agreed, entirely on the question of whether the divorce proceedings in the State of New York had the effect of dissolving the marriage of Mr. and Mrs. Lowe, and, as part of that question, whether that effect is recognized in this country. Now it seems to me that that question depends upon several points, but only one is of real difficulty, and that depends upon whether the Courts of New York had jurisdiction to dissolve the marriage. That is the main point in the case, and that turns upon the question of the exact law of the State of New York applicable to this case. There are, I think, three further points which affect the matter, though they, I consider, affect it in a minor degree. The first of those three points is whether the divorce in New York, assuming the Court had jurisdiction, being for a cause which would not have alone entitled the petitioner to a divorce in this country, would be recognized in this country as a valid divorce. The second point is whether the decision of the Court of New York is affected so as to be treated as nugatory in this country by reason of the fact that the petitioner in New York withheld from the Court facts which, if brought out before the Court, would have been a bar to her suit. The third is a point which was indicated, but I do not think very much pressed, by Mr. Shearman: whether this Court has jurisdiction to entertain a nullity suit, to declare null a marriage which was effected in another country—in this case, in the State of New York. Now, dealing first with what is the real and main point in the case—the American law. The law itself is contained in s. 1756 of the New York Code. That is in these terms: "In either of the following cases, a husband or a wife may maintain an action against the other party to the marriage, to procure a judgment, divorcing the parties and dissolving the marriage by reason of the defendant's adultery: (1.) Where both parties were residents of the State, when the offence was committed. (2.) Where the parties were married within the State." (That is not applicable here, because the parties to that suit were not.) "(3.) Where the plaintiff was a resident of the State, when the offence was committed and is a resident thereof, when the action is commenced. (4.) Where the offence was committed within the State and the injured party, when the action is commenced, is a resident of the State." The clause that is most applicable to the present case, as I understand from those who have given evidence here, is the first clause: "Where both parties were residents of the State, when the offence was committed." It is true the latter clauses have a bearing, because they are independent of the position which the defendant is occupying, and they are dealing with the case where a wife appears to have an independent residence and an independent domicil. Now the question turns partly on the code and partly on the facts. I think the facts that ought to be found are these: First, that Mr. Lowe was domiciled in New York at the time of the suit and at the material time before; secondly—and this I practically take from the admission made by her counsel, Mr. Shearman—that the wife was not in a true sense, as an independent person, permanently domiciled in the State of New York. Her position was that she had gone there for the purpose of obtaining this decree if she could, and with the ultimate intention, if she failed, of remaining to earn her own living. Those appear to me to be the positions of the two parties during the time when the proceedings in New York were going on. Now, having stated what those facts are, one has to endeavour to ascertain what is the true view of the law in this State of New York and to apply that law. The law itself, as I said, is contained in s. 1756; but there is one other section that has some bearing on it which was referred to principally by Mr. Barratt, it is s. 1768: "If a married woman dwells within the State when she commences an action against her husband, as prescribed in either of the last two articles"—one of those articles being the one that contains s. 1756—"she is deemed a resident thereof, although her husband resides elsewhere." He used that section as fortifying the view he expressed on s. 1756. Now, in an ordinary sense, of course, both these people were resident in the State of New York at the time when the suit was proceeding. But the learned lawyers who have been called before me are both agreed upon this point, that the Court in New York would treat in ordinary circumstances the term "resident" as having practically an equivalent effect to our word domicil—in other words, permanently residing in a permanent home in the State. But they differ, and differ, I think, entirely as to the application of the term "resident" to the present case. To state it shortly, the view presented for the petitioner is that, although the husband is, as I have found, permanently resident, and in our sense domiciled in the State of New York, the wife must also, if she is not in fact living with him at the time, so as in fact to have his own domicil—if she is living separately up to the time she comes there—in order to maintain a suit in the New York Court she must be also separately, permanently domiciled in the State of New York; in other words, be there with the permanent intention of remaining. So that each of the two parties must have a separate, or, if they are living together at the time of the suit, a united permanent home; but they must both have, either in one way or the other, a permanent home in the State of New York. The view presented on the other side is this: that, the husband being domiciled in the State of New York, the ordinary principle of law, established, one may say, throughout the whole civilized world, is that the wife's domicil is, legally speaking, the domicil of the husband, unless she has done something to acquire an absolutely independent and separate domicil, and that that is existing at the time of the suit; so that when this code has to be construed and treated for the purpose of its application by a Court dealing with persons situated as these two people were, the proper interpretation and application of it according to New York law would be that the husband's domicil being in the State of New York, the wife having come there with the object of maintaining a suit against him, she has in fact elected, so far as is necessary for the purpose of applying the section to herself, to have the same domicil as he has—in other words, to become a resident sufficiently within the meaning of that section for the Courts to apply their process. Those, I understand, are the two opposing views of the law of New York that are presented for consideration in this case. Now I feel it is practically impossible for me to reconcile those two views: and I feel that one is presented with a serious difficulty, because one has, so to speak, to place oneself in the same position as a judge in the State of New York would be in if this point was raised before him—in other words, to ascertain, through him, what is the rule he would apply in deciding this case; because it is said by both counsel that there is no authority on the subject in the State of New York—no definite decision one way or the other—and that it is, therefore, except so far as the experts express their views about it, an open question, and it is of very little use to go through the evidence which has been given about the matter in detail. I think I have sufficiently stated it in the course of what I have said. From the petitioner's point of view it is very clear. [Having read in extenso some of the expert evidence, the President continued:—] Mr. Barratt gave evidence, a short summary of which I have taken down, and it is this: General residence is tantamount to domicil; a wife may prove a separate domicil in cases of necessity—which, I understand him, is the principal object of introducing the 3rd and 4th sub-sections of s. 1756. This does not prevent her claiming his domicil as hers, and for that proposition he claims the authority of *Hunt* v. *Hunt*. (1) On the other side it is not necessary to read the evidence. It is very clearly stated by Mr. Crane as involving two separate permanent domicils. That being the state of things, it seems to me that I have to ascertain, so far as lies in my power, upon what principle of law the Courts of New York would endeavour to solve this problem. I cannot help thinking there would be this consideration in the outset to guide them. In a case such as this it is said that the wife could maintain a suit in this country (assuming, of course, that she had not been barred by previous matters) against a husband

(1) (1878) 72 New York, 217; 28 American Rep. 129.

who has separated and gone to America and become domiciled there; and there are many cases in which that has been allowed in undefended cases. I am not at the present moment aware—and I would desire to reserve any careful consideration of that point—how that matter would be treated if the case were really put on the domicil of the husband abroad. But in many of the undefended cases what happens is, that the wife is deserted in England. The husband goes to America, nothing is heard about him, and the Court, in order to do justice, either acts upon the view that the husband has not come forward to prove another domicil, and possibly could not be heard to say that he had another domicil when he deserted his wife in this country; or, as some have thought, that a woman may be treated as having been left in a separate domicil of her own, and, to do justice, she is not bound to follow the husband all over the world from place to place, and so may get relief in this country. However that may be, that is a difficult point, and one which does not in the least, to my mind, oust the foreign Court, assuming that it has jurisdiction, from saying, If you have come to our Court and your husband is domiciled here, we will, apart from our statutory difficulties, give you relief. Then, supposing that case is presented to the Court in New York, the Court would very naturally say, Apart from being tied by the section, your husband is domiciled here; his home is here, and prima facie yours is here. You have come here to pursue him and obtain your remedy. Why should that remedy be withheld because, if you succeed, you propose to return to your own country? I should have thought myself, as a matter of justice, expediency and convenience, it was very proper to allow a suit to be entertained in a foreign country in these circumstances, and I cannot help feeling that considerations of that character would weigh very considerably with a judge in the State of New York in deciding whether under such a term as the term "resident" he was to exclude the petitioner from her right to maintain a suit. After giving this matter my best consideration, and endeavouring to decide partly as a matter of principle in the difficulties in which I am placed and partly guided by the evidence that has been given (I may say I was extremely struck with the very clear and forcible way in which Mr. Barratt gave his evidence), I have come to the conclusion that this suit could have been maintained in the State of New York, and therefore, if that is the only question to be determined, that the decree was a good decree. But that does not entirely dispose of the matter, because there are the other three points that I have mentioned. The first of those is whether, this being a decree on a ground which would not be a ground of divorce without something added to it in this country (because it was a divorce on the ground of adultery only), it would be recognized in this country. According to my view that matter has been long ago set at rest, and I need not do more than refer to the very long and full judgment delivered by the late Lord Hannen in the case of *Harvey* v. *Farnie*. (1) The head-note is this, as far as it is necessary to refer to it: "The English Courts will recognize as valid the decision of a competent foreign Christian tribunal dissolving the marriage between a domiciled native in the country where such tribunal has jurisdiction and an Englishwoman, when the decree of divorce is not impeached by any species of collusion or fraud. And this, although the marriage may have been solemnized in England and may have been dissolved for a cause which would not have been sufficient to obtain a divorce in England." I think myself that that has become at the present day almost certain clear law, and it is based upon the simple proposition that if this country recognizes the right of a foreign tribunal to dissolve a marriage of two persons who were at the time domiciled in that foreign country, it must also recognize that their marriage may be dissolved according to the law of that foreign country, even though that law would dissolve a marriage for a lesser cause than would dissolve it in this country. Absurd results would follow if that were not so, because by the law of the domicil they would cease to be husband and wife, and yet if they returned to this country they would be husband and wife. That is not convenient, nor is it logic, and I think if they were bona fide and properly domiciled in the country where it takes place it is a good divorce. The next point is on the question of fraud.

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(1) (1880) 5 P. D. 153; (1882) 8 App. Cas. 43.

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It is said that this Court will not recognize the validity of the decree in America because it was obtained by the suppression of facts which if brought to the attention of the Court out there would have prevented its granting a decree. Now both the two leading lawyers who have been called on each side agree that in America, while that decree stands, it would be a good decree, even though it was obtained by withholding material facts. They have not any machinery for intervention out there, there being no official like the King's Proctor, as we have, and they seem to consider that the decree is good, though the petitioner was guilty of an offence which would have debarred her from getting a decree, unless that decree was set aside. Now it does not follow from that that this Court would recognize that decree as binding if obtained in such a way, and Mr. Duke argued that in many of the judgments it has been said that the Courts will not recognize the decree of a foreign tribunal where it has been obtained by the collusion or fraud of the parties. But I think when those cases are examined that the collusion or fraud which was being referred to was in every case, so far as I have had time to examine the matter, collusion or fraud relating to that which went to the root of the matter, namely, the jurisdiction of the Court. In other words, as an illustration, cases where the parties have gone to the foreign country and were not truly domiciled there, and represented that they were domiciled there, and so had induced the Court to grant a decree. The collusion or fraud in those cases goes to the root of the jurisdiction. There is no jurisdiction if there is no domicil, and therefore collusion and fraud entered into many of those cases in a way that went to fortify the view that where there is no domicil there is no jurisdiction. But supposing that what was kept back was something that would have made the Court come to a different conclusion than it would otherwise have done, I can see no valid reason in the judgments in cases affecting status for treating the decree as a nullity, unless it is set aside. In this Court there are many cases where facts are kept back. In some, of course, the King's Proctor successfully intervenes, but I have no doubt that in many others the facts escape attention; but it has never yet been argued that a decree made and become absolute is not binding, though if it had been interfered with before it became absolute it could have been set aside. The one form always is to set aside a decree, and not treat it as a nullity because somebody has withheld something. I think these cases differ in their results from cases where there is a decree inter partes simply, and upon an action brought on a foreign judgment fraud can be pleaded to that foreign judgment, and if successfully pleaded, then there is a defence, and that is because the Court will not enforce that foreign judgment. Nothing is done to set it aside, but it is not enforced. That, I do not think, is applicable to cases like this. There is some sort of authority, namely, in the case of decrees in rem. In the case of *Castrique* v. *Behrens* (1) the matter was one which has a certain amount of bearing on the question, as will be seen by the short statement of facts in the head-note: "Declaration that the captain of an English ship while on a voyage drew a bill of exchange on the then owners for the necessary disbursements of the ship, and the bill was dishonoured at maturity; that the plaintiff had in the meantime become mortgagee of the ship; that by the French law the bona fide holder for value of such a bill, if a French subject, can take proceedings in rem in the French Courts, and attach and sell the ship in a French port in order to pay the bill; that the defendants, being English subjects and the holders of the bill, after it had been dishonoured conspired with T., a French subject, that they should indorse the bill to him without value, and that he should take proceedings in the French Courts and falsely represent that he was a bona fide holder for value; that this was accordingly done, and orders were thereby obtained from the French Courts that the ship should be attached and sold in a French port; and the plaintiff was thus deprived of his property in her:—Held, that the declaration was bad, as an action could not be maintained while the judgment in rem, though in a foreign Court and obtained as alleged, remained unreversed." That is analogous to what I have been endeavouring to indicate, and I think (though I do not think it is strictly necessary to lay this down absolutely in this case) that the foreign decree remaining

(1) 30 L. J. (Q.B.) 163.

unreversed is binding. I say that, because I am not going to lay down that there are no circumstances outside the question of jurisdiction which would render decrees of this character not properly recognizable in this Court. But where a person endeavouring to complain in a case is the person who is a party to what has been done, I do not think it right to help him, and that he should be allowed to come forward and quarrel with what has been done and then endeavour to set aside a decree which he has recognized, taken advantage of, and acted upon for years, and then seek to invalidate it upon exceedingly technical and refined grounds. That leads me to the last point which was mentioned by counsel, and that is that this suit is between persons both domiciled in this country; and the question is whether the Court will entertain a suit dealing with a New York marriage, or must the parties go to New York? The latter is to my mind a most extraordinary suggestion, because it would mean that the two people wishing to know if they are truly married and properly living together as man and wife, must go to America to find that out. It is perfectly true there are cases which shew that although the parties are not domiciled in this country, but are before the Court in this country, the Court may inquire into the validity of the marriage contract in this country: that is to say, this Court, I think, has held, in the case of a marriage between two persons who are not British subjects—who are not domiciled in this country, but who are here parties to the proceedings—it can inquire into the validity of a marriage contracted in England. But that only means that there may be two Courts that have jurisdiction, that the jurisdiction is not exclusively that of the Court of the country where the marriage was celebrated. It may be also, I think, that the Court of the country in which, though the marriage was not celebrated in it, the parties are domiciled at the time when the suit in question is raised between them has jurisdiction. There is an authority for that proposition in the case of *Ruding* v. *Smith*. (1) Professor Dicey, in his Conflict of Laws, cites that case. I have referred to it, and it is not necessary for my judgment that I should go through it, but he cites it for this proposition at p. 394 of his book: "Two points are clear, first" (that is the only one I need deal with): "The Courts of a country where a marriage is celebrated have no exclusive jurisdiction to determine its validity, for our Courts will determine the validity of a marriage celebrated abroad"; and having referred to that case, I find that the question of the validity of a marriage at the Cape of Good Hope between British subjects who would appear to have been domiciled the husband in England and the wife in the East Indies, or possibly in England, was inquired into and determined by the Consistory Court of London. While I am referring to Mr. Dicey's book I may, perhaps, be permitted to point out that Mr. Dicey, in dealing with that question to which I have already referred, says (p. 391): "The Courts of a foreign country, possibly, have no jurisdiction to dissolve an English marriage." I am not sure in what sense he is using the word "English" there, because that is sometimes used as meaning a marriage celebrated in England and sometimes as meaning where the parties are living in England. He puts two notes of interrogation against that possible exception, and winds up by saying: "The validity, indeed, of the exception is open to the gravest doubt; it is not supported by a single reported case, and is a mere deduction from the principle which English Courts have now, on the whole, surrendered, that the right to a divorce depends on the terms of the marriage contract." I think, as far as I am concerned, I can dispose of that now, and I hope we shall not be troubled with it any more. The result of a somewhat lengthy elaboration of this case—partly because of the general importance of it, and partly because of the importance to the particular parties—is that in my judgment this suit fails and the petition must be dismissed with costs, and I only desire to conclude my judgment with this: that I think it would be a very hard and unreasonable result if one had to come to another conclusion, as the whole of this difficulty arises from the action of the petitioner himself.

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(1) (1821) 2 Hagg. Cons. Rep. 371.

Petition dismissed.

The petitioner appealed. The appeal was heard March 17, 19 and 20.

Duke, K.C., and *Grazebrook*, for the appellant. The question of the validity of the marriage between the petitioner and the respondent depends upon the question of the validity of the divorce proceedings in New York. First, the Court of New York had no jurisdiction to make the decree, because the parties at the time of making the decree were not domiciled in New York. The question of domicil must be determined by the law of England, and there may be a question whether the former husband, Francis Lowe, had done enough to divest himself of his domicil of origin. But assuming that the husband had acquired a domicil in New York, the further question arises whether it was sufficient for the wife to take proceedings against him in New York, thereby adopting her husband's domicil, or whether something more was required. The balance of evidence is in favour of the view that residence by the wife in New York was essential, and that that residence must be almost equivalent to domicil. That appears from the New York Code, and the judgment of the Court of New York itself shewed that it was not the law of that country that a wife abandoned by her husband could take advantage of her husband's domicil for the purpose of procuring a divorce. The proper inference from the evidence is that the wife did not acquire any separate residence or domicil in New York.

Secondly, the decree is void by reason of the suppression by the wife of the divorce proceedings in this country and of her own adultery, since by the law of New York adultery is an absolute statutory bar to obtaining a divorce. This decree was therefore obtained by fraud and cannot stand.

Thirdly, in the case of an English marriage a decree of divorce obtained by the wife in a foreign country on the ground of adultery alone is not good in this country: *Lolley's Case* (1), which shews that an English marriage cannot be dissolved by a foreign tribunal on grounds which could not be sufficient to dissolve the marriage in this country. That case has been considered in many subsequent cases in this country: *Warrender* v. *Warrender* (2); *Dolphin* v. *Robins* (3); *Geils* v.

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(1) Russ. & Ry. 237.

(2) (1835) 2 Cl. & F. 488.

(3) (1859) 7 H. L. 390, 414.

Geils (1); *Shaw* v. *Gould* (2); *Shaw* v. *Attorney-General* (3); *Harvey* v. *Farnie* (4); and it may be that the resolution in *Lolley's Case* (5), as it stands, goes too far: see *Shaw* v. *Gould* (2); but upon its own facts it has never been questioned. Treating an English marriage as implying that the husband at the time of the marriage was domiciled in England, it is submitted that *Lolley's Case* (5) is still law. In *Harvey* v. *Farnie* (4), upon which the President proceeded, the husband was a domiciled Scotsman, and that case falls entirely within *Warrender* v. *Warrender* (6), where *Lolley's Case* (5) was expressly recognized as an authority. In *Scott* v. *Attorney-General* (7) there was a decree which gives the go-by to all these cases, but the decree was made without discussion.

[ROMER L.J. At the time of *Lolley's Case* (5) divorce could only be obtained by special Act of Parliament. May not that fact have influenced the minds of the judges in that case?]

The point that divorce was then in form legislative does not appear to have been taken in any discussion of *Lolley's Case* (5), but in effect it was judicial.

[ROMER L.J. *Lolley's Case* (5) is only applicable where the facts are precisely similar: see *Harvey* v. *Farnie*. (8)]

The decree of a foreign Court obtained by fraud or collusion is not entitled, internationally, to recognition; fraud avoids all judicial acts, civil or ecclesiastical: *Duchess of Kingston's Case* (9); *Shedden* v. *Patrick* (10); *Bonaparte* v. *Bonaparte*. (11)

[COZENS-HARDY L.J. That last case was one of want of jurisdiction.]

Yes, but it was treated as a case of fraud on the Court; and it is very like the present case.

Barnard, K.C. (*M. Shearman, K.C.*, with him), for the respondent, the wife. The New York Court had jurisdiction to annul the English marriage from the fact that both parties were then resident in New York, and in this case the English Court will accept the decree of the New York Court. It is clear that Mr. Lowe was domiciled in New York.

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(1) (1852) 1 Macq. 255.

(2) (1868) L. R. 3 H. L. 55.

(3) (1870) 2 P. D. 156, 161.

(4) 5 P. D. 153, 156; 8 App. Cas. 43.

(5) Russ. & Ry. 237.

(6) 2 Cl. & F. 488.

(7) (1886) 11 P. D. 128; 56 L. T. 924, where the case is more fully reported.

(8) 5 P. D. 153, at p. 162; 6 P. D. 35, at pp. 44, 45.

(9) 2 Sm. L. C. 11th ed. 731.

(10) (1854) 1 Macq. 535.

(11) [1892] P. 403.

[Collins M.R. We are satisfied that Mr. Lowe had acquired an American domicil.]

Mrs. Lowe also had acquired a domicil in New York. The American law allows a wife to acquire a domicil in the same State as her husband: the husband's domicil is, in fact, the wife's also, when she resides in the same State; therefore, if the wife chooses, bona fide, to go to the husband's place of domicil, she is entitled to do so. The President accepted Mr. Barratt's evidence on this point; therefore, as a matter of law, the American Court had jurisdiction to dissolve the marriage.

Lolley's Case (1) has been explained in numerous subsequent decisions; it was fully discussed in *Harvey* v. *Farnie* (2), and that case is in favour of the respondent, and is precisely in point. The respondent relies, too, on the judgment of Brett L.J. in *Niboyet* v. *Niboyet*. (3) The material circumstance to be considered is, the domicil of the parties at the time of the institution of proceedings; it is the domicil that gives jurisdiction: *Le Mesurier* v. *Le Mesurier*. (4)

It has been urged that the divorce was not good because it was pronounced by the Court of a country which was not the country of the marriage, but that proposition cannot be supported: *Scott* v. *Attorney-General*. (5) The judgment of the New York Court is a judgment affecting the status of the parties, and is in fact a judgment in rem which cannot be impeached in proceedings taken in this country by a person who was not a party to the proceedings in which that judgment was pronounced: *Castrique* v. *Behrens*. (6)

There is no evidence of collusion between Mr. and Mrs. Lowe in this case. There was no fraud: the fraud alleged is the concealment of the fact that there had been proceedings in England which had failed in consequence of the wife's adultery; but the wife was not bound to state this in her pleadings, and the husband, though he might have raised it in his absence, put in no plea to this effect in accordance with the New York Code, s. 1758. At the utmost there was simply an irregularity in the proceedings, which is not sufficient to upset the judgment: *Pemberton* v. *Hughes*. (1) The judgment of the American Court is final and binding unless it can be shewn that there was no jurisdiction.

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(1) Russ. & Ry. 237.

(2) 8 App. Cas. 43.

(3) (1878) 4 P. D. 1, at pp. 9 to 20.

(4) [1895] A. C. 517.

(5) (1886) 11 P. D. 128.

(6) 30 L. J. (Q.B.) 163.

The *Duchess of Kingston's Case* (2) was only a case of jactitation of marriage: Hawkins' Pleas of the Crown, 8th ed. *Shedden* v. *Patrick* (3) only goes to the question of jurisdiction.

Duke, in reply, referred to *Briggs* v. *Briggs*. (4)

Cur. adv. vult.

March 30. Collins M.R., after stating the facts, continued:—A great variety of points were taken in argument to establish the contention that, first, there was no jurisdiction in the Court in New York to entertain the matter at all by reason of the failure to perform the conditions precedent imposed by the law governing the matter in the State of New York. That, of course, raised a question of foreign law, namely, the question of the proper construction of the New York Code which governed the proceedings, and there was a great contention whether Mrs. Lowe had brought herself within the provisions of the law of New York so as to entitle her to appear and ask for a divorce in the American Court. There was also another contention going to the same point, and in fact going to the root of the whole position, namely, that even if she had performed the conditions precedent within the meaning of the New York marriage law, her husband had never been domiciled in New York State, and that, therefore, she was not in a condition, by reason of the absence of the domicil of the husband, and, consequently, of the absence of domicil in herself in New York, to initiate these proceedings at all.

There were also other points which were argued and insisted upon, namely, first of all, that this divorce in New York, even if in other respects it was unimpeachable, that is to say, if there was jurisdiction and domicil, still there was a flaw, inasmuch as it had been brought about by collusion between the husband and the wife. Another ground was, that apart from collusion, it was vitiated by fraud, inasmuch as the lady had kept back from the New York Court the fact that she had been found guilty of adultery in the proceedings in England; and that, according to the marriage law of New York, if that fact had been avowed, the American Court would not have given her the relief, which she sought, in granting a divorce.

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(1) [1899] 1 Ch. 781.
(2) 2 Sm. L. C. 11th ed. p. 731.
(3) 1 Macq. 535.
(4) (1880) 5 P. D. 163.

Then, in addition to those points, and underlying them all, came the point which is the one that has taken up the greater part of the time in its development, and that was that even if all conditions required by the marriage law of New York were fulfilled, and there was no flaw in the decree, nevertheless, according to the well-known rule laid down in a case of great authority in this country, *Lolley's Case* (1), an English marriage could not be dissolved by the decision of another Court on grounds which would not have satisfied an English Court if it had to deal with the matter. I think I have now stated nearly all the points that were put before us by Mr. Duke in his very able and interesting argument.

Now, first of all, I will deal with that part of the case which depends wholly on fact. It was contended that Mr. Lowe had not himself acquired a domicil in New York. That was a question of fact, and upon the facts the Court below was satisfied that Mr. Lowe had acquired a real bona fide domicil in the State. It seems to me that when one looks at the evidence, as we were bound to do, the evidence on that matter is all one way. Mr. Lowe had every reason for leaving this country, and he left without apparently any intention of returning at all. He took out letters of naturalization in America, and he went out with the woman with whom he had been living before, and he was cohabiting with this woman in New York. The evidence points clearly to the conclusion that he had renounced all intention of resuming his English domicil of origin, and had made himself, with the full intention of remaining there, a citizen of New York. That perhaps is the most material point of fact in the whole case.

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(1) Russ. & Ry. 237.

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Then comes the question, which was very much debated, whether under the circumstances of this case Mrs. Lowe had put herself into a position to entitle her to avail herself of the proceedings for divorce in America. Now that raised a question of law upon the true construction of the New York Code, and whether the better opinion was that she could attract to herself the acquired domicil of her husband, Mr. Lowe, who, on the hypothesis I have accepted, was a domiciled citizen in New York, and was entitled to follow him and take proceedings against him in New York, by virtue of his domicil in New York, his domicil becoming hers. There was a good deal of discussion among the American experts called on that point, and the learned President, after a very elaborate investigation of the matter, came to the conclusion that it was competent for the lady, according to the law of New York, to take the proceedings she had taken, even although she had an intention herself of returning to her British domicil as soon as she had got her divorce. That was his view of the result of the American law. That is a question of fact, and I see no reason to differ from his view—in fact it entirely accords with my own view formed upon reading the evidence of these experts. Therefore, it seems to me that we have got to this point, that there clearly was jurisdiction in the American Court, as the Court of the domicil, to deal with the matter.

Then the next question is, Is that vitiated by collusion, or in other words, by fraud? There really was no evidence of collusion, and Mr. Duke very faintly contended that collusion had been established. It is quite clear there was no collusion in the sense of the two parties having conspired together to deceive the New York Court in arriving at the conclusion at which it did arrive. The evidence was that steps had been taken to serve Mr. Lowe out there. There was no evidence of any meeting between Mr. Lowe and Mrs. Lowe, or of any collusion, and, therefore, the case must be dealt with on the footing that there was no such fraud, in the shape of collusion, as to vitiate, if it would vitiate, the proceedings.

Then comes another point, namely, the suppression, as it was said, by the lady of the fact that she had been found guilty of adultery in the English proceedings. It was said that the decree having been obtained on those grounds that was enough to avoid it in proceedings in an English Court. Upon that Mr. Duke was met by what the President considered afforded a complete answer, namely, that that is a judgment affecting the status or a judgment which, if not technically in rem, stands on the same footing as a judgment in rem. There is a good deal of authority to shew that it is really indistinguishable from a judgment in rem. Some of the judges seem to have considered that for some reason it is not an absolute judgment in rem, but for all purposes it is on the same footing, that is to say, it is a judgment affecting the status of the parties. If it is a judgment in rem, or stands on the same footing, as I think it undoubtedly does, can it be impeached in proceedings taken in this country by a person not a party to that judgment at all? Can proceedings effectually be taken in this country while that judgment stands unimpeached in the country where it was made? There is clear authority in our Courts that that cannot be done, and I think it is the authority on which the President acted.

The point arose in the case of *Castrique* v. *Behrens* (1), the head-note of which is sufficient to explain the point. [Having read the head-note, the Master of the Rolls continued:—] There the demurrer had admitted fraud of the most unequivocal character on the part of the persons who conspired together to give an apparent title to a person as a bona fide holder for value, whereas he had, in point of fact, taken the bill without value, and simply as part of the conspiracy to defraud the defendant. Under those circumstances, although the judgment was obtained by fraud, it was held to be binding in proceedings in this country, inasmuch as an action could not be maintained while the judgment in rem, although in a foreign Court, and obtained in that way, remained unreversed. That is an authority directly in point on that part of the case, but I am not at all satisfied that there was any such fraud shewn as a matter of fact in this case. I think there is a great deal to be said for the view put before us by Mr. Barnard, that the fact of the adultery in England was an issue to be raised by plea, and there was no plea. The defendant Lowe, being cited, was in a position, had he chosen to meet the case made against him, to bring that forward before the Court. But it is not necessary to decide on that ground. Therefore, for the reasons I have stated, if there were fraud in obtaining the judgment in rem, it could not be availed of in proceedings in this Court having for their object the impeaching of that judgment.

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(1) 30 L. J. (Q.B.) 163.

That brings me, I think, to the last weapon in Mr. Duke's armoury. Admitting all those things, and that the decree of the Court with regard to parties having their domicil in the country of that Court, was unimpeachable on the ground of fraud in that Court, aye or no, is it possible that the decree of a foreign Court can undo an English marriage on grounds short of those which would be essential in this country? Mr. Duke relies, as I have said, on *Lolley's Case* (1) as justifying his contention that the marriage could not in those circumstances be dissolved. Now *Lolley's Case* (1) was decided as far back as 1812. It is not a decision of the Court, but it is a resolution of all the judges; and what the judges resolved was this: (2) "The judges held the conviction right, being unanimously of opinion that no sentence or act of any foreign country or State could dissolve an English marriage a vinculo matrimonii for ground on which it was not liable to be dissolved a vinculo matrimonii in England"; and so on. I need not read the rest. That, I have no doubt, was a most authoritative pronouncement of all the judges, and I think Mr. Duke was right in saying it has never been in terms overruled by the House of Lords; but, nevertheless, it has been explained in a number of cases which I do not propose to go through, because, I think, there is one case, the last of all, in which the whole position has been summed up. I may perhaps refer to one case before that, which certainly puts a very marked limitation on that proposition. That was a case in the House of Lords of *Harvey* v. *Farnie*. (3) In that particular case a native of Scotland, who had at the time no other domicil, married an Englishman. They then went to Scotland and lived there, and both of them had, by virtue of the marriage, a Scottish domicil.

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(1) Russ. & Ry. 237. (2) Russ. & Ry. at p. 239.
(3) 8 App. Cas. 43.

Proceedings were taken for a divorce in Scotland, and a divorce was granted on a ground that would not be sufficient to procure a divorce in England, and it was held that that divorce, although involving the annulling of a marriage, English in one sense, was good by reason of the fact that it was a decision of the Court of the domicil. There, no doubt, the original domicil was Scotch, but, nevertheless, the English marriage was held not unimpeachable by a person of Scotch domicil, although solemnized in England. The words must be limited to an English marriage so as not to embrace a marriage which, although solemnized in England, was solemnized with a man of another domicil. That left it still open whether, if the marriage in England was a marriage between domiciled English people, it could be undone by a Court where those persons had afterwards acquired a fresh domicil—the domicil of the country where they were settled. That point was still left open, but there were many dicta and expressions of opinion that the governing factor in all these cases ought to be domicil, and if you have a bona fide domicil in the country where the proceedings for divorce were taken, those proceedings ought to govern the matter and are valid and effectual. That point was not expressly decided in the House of Lords in *Harvey* v. *Farnie* (1), although there were many dicta of the noble Lords which undoubtedly pointed in that direction.

In that state of the authorities the question came up before a very strong Court in the Privy Council in the case *Le Mesurier* v. *Le Mesurier*. (2) The Board in that case consisted of Lord Herschell, the then Lord Chancellor, Lord Watson, Lord Hobhouse, Lord Macnaghten, Lord Morris, and Sir Richard Couch, and although the particular point I am referring to was not necessary for the actual decision of the case, still it was a considered statement of the law upon the point; and in a sense it was necessary, because they could not decide the actual point before them without laying down a general principle of law in the matter. The head-note does not necessarily involve the position which is in discussion in this case, but I will read it, and then read the passage which I think is the most authoritative in our law upon this matter. The head-note is as follows: " The matrimonial law

(1) 8 App. Cas. 43. (2) [1895] A. C. 517.

applicable to British or European residents in Ceylon is the Roman-Dutch law as it existed in the Colony at the date of the Royal Proclamation of the 23rd of September, 1799; and that law did not contain any rule specially conferring on the local Courts divorce jurisdiction a vinculo over European spouses resident in the island, but whose marriage and domicil were in England. Held, further, that the permanent domicil of the spouses within the territory is necessary to give to its Courts jurisdiction so as to divorce a vinculo as that its decree to that effect shall by the general law of nations possess extra-territorial authority. A so-called 'matrimonial domicil,' said to be created by a bona fide residence of the spouses within the territory, of a less degree of permanence than is required to fix their true domicil, cannot be recognized as creating such jurisdiction." In that case persons who were married in England and were domiciled English people went to Ceylon, and the question was whether the Court of Ceylon had acquired jurisdiction over them by virtue of residence without acquisition of domicil so as to effectually undo an English marriage, and it was held it had not, because they had acquired a so-called matrimonial domicil instead of a real bona fide domicil. If they had acquired a real permanent domicil then, in the view of the Court, the Court of Ceylon would have had jurisdiction to undo the marriage. This case refers, I think, to all the cases—certainly to all the important cases—upon the subject and reviews them all, and at the very end of the judgment, on p. 540, Lord Watson says: "Their Lordships have in these circumstances, and upon these considerations, come to the conclusion that, according to international law, the domicil for the time being of the married pair affords the only true test of jurisdiction to dissolve their marriage. They concur, without reservation, in the views expressed by Lord Penzance in *Wilson* v. *Wilson* (1), which were obviously meant to refer not to questions arising in regard to the mutual rights of married persons, but to jurisdiction in the matter of divorce: 'It is the strong inclination of my own opinion that the only fair and satisfactory rule to adopt on this matter of jurisdiction is to insist upon the parties in all cases

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(1) (1872) L. R. 2 P. & M. 435, at p. 442.

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referring their matrimonial differences to the Courts of the country in which they are domiciled. Different communities have different views and laws respecting matrimonial obligations, and a different estimate of the causes which should justify divorce. It is both just and reasonable, therefore, that the differences of married people should be adjusted in accordance with the laws of the community to which they belong, and dealt with by the tribunals which alone can administer those laws. An honest adherence to this principle, moreover, will preclude the scandal which arises when a man and woman are held to be man and wife in one country and strangers in another.' "

It seems to me, therefore, that the law now unquestionably stands in this position: That the Court of the existing bona fide domicil for the time being of the married pair has jurisdiction over persons originally domiciled in another country to undo a marriage solemnized in that other country. It seems to me that that is the law now, applicable to this case because we have it as a fact that the domicil of the parties, through the husband, was an American domicil—a domicil in the State of New York, and that therefore the divorce obtained in New York governed their rights everywhere else.

In my opinion, therefore, the President was perfectly right in refusing to give the plaintiff the relief he sought, and this appeal must be dismissed with costs.

ROMER L.J. I am of the same opinion. Having regard to the importance of the case, I think it will be right for me to make a few observations on some of the points arising for decision. I will first deal with the objection taken to the divorce decree on the ground that the New York Court had no jurisdiction to entertain that divorce action, or to grant the decree. Now, that question may have to be regarded from two points of view. In the first place, it may be regarded from the point of view of the law of the State of New York; and, in the second place, from the point of view of the law of England as regards the question of jurisdiction. I will first take the question of jurisdiction from the point of view of the law of the State of New York. According to that law, had the Court which pronounced this decree of divorce jurisdiction to entertain the action and to grant the decree of divorce? I think it had, for on the facts I think the judge came to a right conclusion, that the husband had changed his original English domicil, and had, at the time when the action was brought in the State of New York and the decree of divorce was pronounced, acquired a domicil in that State; and, undoubtedly, the adultery complained of by the wife in that action was committed in the State of New York. Therefore, so far as concerns the position of the husband according to the law of the State, the Court had jurisdiction to entertain the action; but, according to that law also, it was necessary that the wife must reside in the State at the time of action brought. For the purposes of the expression "reside," I take it from the experts who have given evidence in this case that, speaking generally, residence may be taken to be equivalent to domicil; that is, domicil regarded from the point of view as to what constitutes domicil according to the law of the State of New York.

Now the question arises, was the wife dwelling in the State at the time she brought this action? Undoubtedly, according to the law of the State, the wife, in the circumstances which happened here, could have had a separate domicil from that of the husband, but I take it that the wife might have exercised her option, and that she was quite entitled, if she chose, to say that her domicil still remained the domicil of her husband as assumed by him, that is to say, domiciled in New York State, and I think that by going, as she did, to dwell in the State for the purpose of bringing the action for divorce, and then bringing that action, it must be taken that she had elected to make that domicil, at any rate for the purposes of the action, the domicil of her husband in New York State; and I cannot see that there is any good reason why the wife, if she chose so to elect her domicil, should not have elected to take that domicil for the purposes of the divorce if she could obtain it. Moreover, taking the expert evidence as a whole, I come to the same conclusion as that arrived at by the learned President, namely, that the wife had, according to the law of the State of New York, when she brought this action, a residence there within the meaning of

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the word as used in the Code governing the law in the State of New York. The result is that, dealing with the question of jurisdiction from the point of view of the law of the State of New York, the Court had jurisdiction to entertain the action.

Then how does the matter stand from the point of view of the English law? I have already stated that, on the facts, the husband had changed his domicil, and had acquired a domicil in the State of New York. According to the English law, until divorce the wife's domicil would be that of the husband, or, at any rate, might be that of the husband if she chose, to the extent of her electing to regard the changed domicil of the husband as her domicil, and there is no reason, according to English law, why she should not be at liberty, if she chose, to go abroad to the State of New York, electing for the purposes of the divorce proceedings, her domicil to be that of the husband and suing him there; and, according to English law, I take it that, at the time of action brought and divorce granted there, the domicil of both the husband and the wife was the domicil of the State in which the Court in which the action was brought was situated, so that the Court there had ample jurisdiction according to English law. Therefore, in whichever way the matter is regarded, it seems to me clear that the Court granting this divorce had jurisdiction.

That brings me to consider the next question, which is this. Putting aside for the moment any question of collusion or fraud, was not the decree so given one which the English Courts would recognise, although the divorce was granted in the State of New York on a ground which would not be sufficient in itself for the English Courts to grant a decree of divorce? Dealing with that question, in the first place, as a matter of principle, it is difficult to see why the English Court should not recognize that decree of divorce in the circumstances of this case. It is not as if it could be pretended that the celebration of marriage in this country was of a different kind, or had more sanctity, or effect, than a marriage constituted in any other Christian country; and, that being so, seeing that the question of divorce as between husband and wife is one affecting the status of the parties, why should not that question be capable of being solved and determined according to the law of the country where the married people have their domicil at the time the question of divorce arises, and where the proceedings for divorce are accordingly taken? If the husband and wife, though married in England, go and live in a foreign country, and acquire a domicil there, why should the English Courts refuse to recognize the validity of a decree validly granted by a Court of competent jurisdiction, according to the law of the State in which the parties are domiciled? I cannot see. I know of no sufficient reason, nor is there, to my mind, any authority binding us which prevents us from giving effect to the view I have indicated. With regard to the resolution in *Lolley's Case* (1), which has been so often discussed and reflected upon, I take it to be settled that that resolution must be treated as being confined to the facts of the case in which the resolution was given, those facts being that the judges were dealing with a case in which the divorce judgment that was being questioned was given by a Court in a country in which the parties divorced were not domiciled. I take it that the law of England at the present time is well stated in the case of *Le Mesurier* v. *Le Mesurier* (2), to which the Master of the Rolls has referred, not only in the passage he quoted, but also in the following passage, which it may be worth while to read, as it particularly deals with the resolution in *Lolley's Case.* (1) In Lord Watson's judgment on p. 527 of the report, he says: "When the jurisdiction of the Court is exercised according to the rules of international law, as in the case where the parties have their domicil within its forum, its decree dissolving their marriage ought to be respected by the tribunals of every civilized country. The opinions expressed by the English common law judges in *Lolley's Case* (1) give rise to a doubt whether that principle was in consistency with the law of England, which at that time did not allow a marriage to be judicially dissolved. That doubt has since been dispelled, and the law of England was, in their Lordships' opinion, correctly stated by Lord Westbury in *Shaw* v. *Gould* (3) in these terms: 'The position that the tribunal of a foreign country having jurisdiction to dissolve the marriages of its own subjects, is competent to pronounce a similar decree between English subjects who were married in England, but who before and at the time of the suit are permanently domiciled within the jurisdiction of such foreign tribunal, such decree being made in a bona fide suit without collusion or concert, is a position consistent with all the English decisions, although it may not be consistent with the resolution commonly cited as the resolution of the judges in *Lolley's Case*.' " (1)

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(1) Russ. & Ry. 237.

(2) [1895] A. C. 517.

(3) L. R. 3 H. L. 55, at p. 85.

That being so, it appears to me that the second ground taken on behalf of the appellant fails.

I need only make a few observations with regard to the third ground on which the appellant bases his case, that is, the alleged ground that the divorce decree in the State of New York had been obtained by collusion and fraud. In the first place, on the facts, it is clear there was no collusion; and secondly, with regard to the allegation of fraud, the only fraud suggested, or that could be substantially suggested, was said to arise from the fact that the wife, in the proceedings in the State, did not disclose the fact that she had herself been guilty of adultery. First of all, let it be noted that that non-disclosure cannot be said to go to the question of the jurisdiction of the Court. Ought it, then, according to the law of this country, or according to the law of the State of New York, to be recognized as a ground which would make the decree one of no effect as matters stand? In my opinion that cannot be said. As was pointed out by the Master of the Rolls, if the husband had appeared (which he did not) to the divorce proceedings, it would have been his duty to plead, and to have put in an allegation, if he intended to rely upon it, that the wife had committed adultery. He did not put in an appearance, and accordingly there was no plea. Did the fact of no appearance being put in, and no plea by the husband, throw upon the wife any extra duty towards the Court? I am not satisfied that it did. Nor even am I satisfied that if the adultery had been proved to the Court in the State before the divorce decree had been pronounced, that would necessarily have been fatal to the right to obtain the divorce. I need not further dwell upon this consideration, for it is agreed by all the experts who have given evidence in the case that the Court in the State having once pronounced, as it did, a decree for divorce, that decree cannot be upset on the ground, as has been argued, of the non-disclosure of the fact of adultery on the part of the wife. That decree is valid and binding according to the law of the State of New York, where the parties, as I have pointed out, were domiciled, and the Court had undoubted jurisdiction in the matter. No proceedings have been or could be taken in the State to impeach that decree which now stands, and certainly ought to be recognized by this Court, not only on the ground, as it appears to me, that it was a judgment in rem, and therefore binding on this Court so long as it stands, but I think, also, on another principle which is conveniently stated in the case of *Pemberton* v. *Hughes* (1), where Lindley M.R. says: "If a judgment is pronounced by a foreign Court over persons within its jurisdiction, and in a matter with which it is competent to deal, English Courts never investigate the propriety of the proceedings in the foreign Court, unless they offend against English views of substantial justice. Where no substantial justice, according to English notions, is offended, all that English Courts look to is the finality of the judgment and the jurisdiction of the Court, in this sense and to this extent—namely, its competence to entertain the sort of case, which it did deal with, and its competence to require the defendant to appear before it. If the Court had jurisdiction in this sense and to this extent, the Courts of this country never inquire whether the jurisdiction has been properly or improperly exercised, provided always that no substantial injustice, according to English notions, has been committed."

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(1) Russ. & Ry. 237

Bearing that principle in mind, it appears to me it cannot be said that, according to English law, our idea of substantial justice requires us not to recognize the validity of the decree of the Court in the State of New York for the reason, among others, that we have ourselves a similar law. If a decree absolute for divorce had been obtained in this country at the instance of the wife, and the adultery of the wife had not been disclosed, these Courts would not allow that decree to be impeached on any suggestion after the time had elapsed in which the decree had become absolute. Certainly it cannot be said that our English notions of what substantial justice requires necessitates any interference by our Courts with the validity of the decree for divorce in the State of New York in this case. For these reasons I think this third objection taken by the appellants fails, and the appeal, consequently, altogether fails.

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(1) [1899] 1 Ch. 781, at p. 790.

Cozens-Hardy L.J. The only question in this case is as to the validity of a decree of divorce granted in the State of New York, the marriage having been celebrated in England, between persons domiciled in England. The marriage was in 1880. In 1889 the husband went to New York, having separated from his wife, and I think it is clearly established that in 1890, when the divorce proceedings were instituted, he had abandoned his English domicil, and acquired a domicil in the State of New York. His wife, who was living in adultery in England, went over to New York for the purpose of obtaining a divorce from her husband, who was living there in adultery. There was no collusion between the husband and wife, but the fact of the wife's matrimonial misconduct in England was not brought to the notice of the New York Court. Under these circumstances the true inference of law is that the wife, who presumably, if not necessarily, had her husband's domicil, by her conduct manifested her election to treat herself as not having a separate domicil, but as following her husband's domicil in New York. This being so, it is now settled by authority, which binds us, that the Court of the country in which the parties were domiciled—that is to say, New York—was the Court having jurisdiction to decree a divorce, even though the divorce was granted for a ground which would not be sufficient in England. *Harvey* v. *Farnie* (1) and *Le Mesurier* v. *Le Mesurier* (2) seem to establish this proposition beyond doubt. The evidence as to the law of New York given by four experts was not wholly consistent, but I see no ground for differing from the view of the President on this point. He held that the evidence given by Mr. Barratt was upon the whole to be preferred, and moreover, that it was in accordance with general principles. The result is that the decree of divorce was valid. It cannot be questioned by the appellant in New York on the ground that facts were suppressed. It is conclusive there unless and until set aside, and I see no ground for allowing its validity to be impeached in this country. The suppression of evidence does not go to the point of jurisdiction, and it would be dangerous to countenance the idea that a final decree of divorce, changing the status of the parties, can be reopened or questioned in this country when it could not be questioned in the Court which granted the divorce. The result is that, in my opinion, the appeal fails.

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(1) 8 App. Cas. 43.

(2) [1895] A. C. 517.

Appeal dismissed.

Solicitors: *Ridsdale & Son, for James S. Smith, Liverpool*; *Sharpe, Parker, Pritchards, Barham & Lawford, for Style, Lindsay & Squarey, Liverpool.*

W. C. D.

[IN THE CONSISTORY COURT OF SOUTHWELL.]

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Feb. 6.

MARKHAM *v.* ALL AND SINGULAR THE VICAR, CHURCHWARDENS, PARISHIONERS, AND INHABITANTS OF SHIREBROOK.

Ecclesiastical Law—Faculty—Ornaments of the Church—Liability to abuse by Superstitious Reverence—Stations of the Cross set up, not for purpose of decoration only, but to take a place in devotions paid to the Deity before them—Sacring Bell—Altar Cards—Crucifixes—Discretion to refuse Confirmatory Faculty where opinion of churchgoing Parishioners adverse to Retention of Ornaments—Decorations—Image of the Good Shepherd—Effect of Consecration on Church Ornaments—Practice—Arches Court Rules, September, 1903.

A faculty was granted to remove out of a parish church as illegal church ornaments certain pictures known as Stations of the Cross, placed in the church without a faculty having been obtained for their introduction, and set up, not for purposes of decoration only, but intended to take a place and play a part in devotions to be paid to the Deity before them, and having been in fact used as intended.

A confirmatory faculty was also granted for the retention in the same church of a small figure standing on a bracket under a canopy representing Our Saviour as the Good Shepherd, the whole figure made of oak and uncoloured, and affixed about ten feet from the ground to the east wall of the church on the south side of the chancel arch, it being held to be a mere architectural decoration not liable to give occasion to superstitious reverence in any form.

An application for a confirmatory faculty to authorize the retention in a parish church of church ornaments not illegal of themselves, but placed in the church without the authority of a faculty cannot be regarded in any more favourable light than an application for a faculty for the first introduction into the church of the same church ornaments, and in all such cases the Ordinary will refuse to grant the confirmatory faculty prayed for unless there is before him sufficient evidence of a general desire of the churchgoing parishioners for the retention in the church of the church ornaments in question.

Where, therefore, two isolated crucifixes had been placed over the pulpits in a parish church by the incumbent without the sanction of a faculty the Ordinary, without deciding either whether the crucifixes were illegal per se or whether on the evidence they were or were not liable to be abused by superstitious reverence, being of opinion that it had been sufficiently proved that no general desire on the part of the churchgoing parishioners existed for the retention in the church of such unusual adjuncts of the pulpits of the churches of the Church of England, refused to grant a confirmatory faculty authorizing their remaining in the church, and decreed a faculty to issue for their removal.

A bishop does not by consecrating or dedicating a church give any episcopal sanction—direct or indirect—for the retention in the church of church ornaments or decorations which may have been in the church at the time of its consecration or dedication.

Practice where an appeal apud acta is asserted in a case to which the rules and regulations of the Arches Court issued September, 1903, are applicable.

THIS was a cause of faculty instituted on behalf of Arthur Basil Markham, of Stuffynwood Hall, in the county of Derby and diocese of Southwell, Esquire, member of Parliament for the Mansfield division of Nottinghamshire, for the purpose of obtaining a faculty to require or authorize the removal out of the parish church of The Holy Trinity, Shirebrook, of certain ornaments, articles, and things submitted by the petitioner to be illegal, and to have been illegally placed in the above-mentioned church, and described in the amended petition—brought in on February 25, 1905—(paragraphs 4 to 8), as follows: (1.) Fourteen pictures, commonly called the Stations of the Cross, displayed or placed on the walls of the church; (2.) an image of Our Saviour (referred to in the 5th paragraph of the petition) brought into the church and placed on the wall adjacent to the pulpit in the old portion

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of the said church; (3.) a large crucifix hung above the principal pulpit of the church; (4.) a small crucifix placed above the pulpit in the old portion of the church; (5.) a marble crucifix standing on a side table not far from the Communion table in the church; (6.) a hand bell, called a sacring bell, used for the purpose of illegal ringing during the celebration of the Holy Communion in the church, and for other purposes not allowed by law or required by the rubric contained in the Book of Common Prayer; (7.) certain printed cards or books, called altar cards, placed on the Communion table, or near thereto, for the use of the minister celebrating at the Holy Communion.

The 9th paragraph of the petition alleged that all the above-mentioned articles, ornaments, and things were liable to be subjected to superstitious uses, and were naturally conducive to such uses, or were kept for the purpose of being used, and were used, in connection with ceremonies and services alleged to be contrary to the provisions of the Book of Common Prayer, and the petition concluded by praying that a faculty might be granted to the petitioner, or to such person or persons as the Court might select, requiring him or authorizing them to remove the above-mentioned articles, ornaments, and things from the said church.

An appearance against the granting of the faculty was entered on April 20, 1905, for the Rev. Edward Braddon, the vicar of Holy Trinity, Shirebrook, and William Baird and John C. Badley, the churchwardens of the same church, and other persons to the number of thirty-one, including Mrs. Helen Elizabeth Paget, the patron of the living of Shirebrook (1), and

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(1) Subsequently on June 16, 1905, the solicitors for the respondents obtained an order by consent, under which leave was given to enter an appearance on behalf of sixty-four persons, in addition to those persons who had already entered an appearance on April 20, 1905. There were therefore at the date of the first day of the hearing of the suit, in addition to the vicar, churchwardens, and the patron of the living, more than ninety persons who had made themselves parties to the suit as opponents.

As to the practice of a number of parishioners and inhabitants who object to the grant of a faculty entering an appearance as opponents, and thus bringing their views before the Court as parties in cases where memorials by persons not parties to the suit would be inadmissible as evidence, see *Peek* v. *Trower*, (1881) 7 P. D. 21; [1892] P. 271, n.;

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OVERSEERS.

on May 19, 1905, the solicitors for the opponents, on behalf of the vicar and churchwardens and certain parishioners (the Rev. Edward Braddon, both churchwardens, and eighty-four other names) (1) of the parish of Shirebrook, therein called the respondents, filed their objections in detail to the petition. (2) In these objections in detail the grounds for objecting to the petition were stated substantially as follows:—

1. The respondents do not admit that the articles, ornaments, and things mentioned in the petition, or any of them, are illegal or have been illegally placed in the church, or that there is any ground for their removal.

2. The respondents deny that the said ornaments and things, or any of them, are liable to be subjected to superstitious uses or are naturally conducive to such uses, or are kept in or used in the said church for the purpose of being used in connection with ceremonies or services which are contrary to the provisions contained in the Book of Common Prayer.

3. The pictures known as the Stations of The Cross were the gift of the respondent, Mrs. Paget, the patron of the living of Shirebrook, who presented them during the incumbency of the Rev. F. L. Ware between the years 1881 and 1889, and they formed part of the decorations and furniture of the church at the time of the consecration by the late bishop of the diocese, Bishop Ridding, on November 8, 1899.

4. The image referred to in paragraph 5 of the petition is a figure carved in wood representing the Good Shepherd, and was also the gift of Mrs. Paget. The said figure was part of the decorations or furniture of the church at the time of the consecration in 1899 as aforesaid.

5. All the three crucifixes mentioned in the petition were the gift of parishioners, the large crucifix by the pulpit was

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Nickalls v. *Briscoe*, [1892] P. 269, at p. 275.

(1) These objectors included only fifty-nine of those persons, on behalf of whom appearances in the suit had been entered as above stated.

(2) On the first day of the hearing the Court, on the application of counsel on behalf of the petitioner, ordered that the names of seven of these objectors should be struck out of the list of objectors, as they did not intend to become parties to the suit.

presented in the year 1904, and was in its present position when the new nave of the church was dedicated by Dr. Ridding on April 30, 1904; the marble crucifix was also in the church prior to the dedication; the remaining crucifix was presented before the said consecration in 1899, and formed part of the decorations or furniture of the church at the time of the aforesaid consecration.

6. The bell referred to in the petition was the gift of the Rev. Edward Braddon in the year 1899, and was part of the decorations or furniture of the church at the time of the aforesaid consecration.

7. The respondents do not admit that there are any altar cards placed on the Communion table or near thereto for the use of the minister celebrating at the Holy Communion, as alleged in the petition, and it is submitted that such articles are not properly the subject of a faculty.

8. At a meeting of the parishioners assembled in vestry, duly convened on April 25, 1905, it was unanimously resolved as follows: "That the meeting of the vestry is strongly opposed to the application of Mr. Markham for a faculty to remove the ornaments from Shirebrook parish church, and is of opinion that in his action Mr. Markham has been animated only by a vindictive feeling against the vicar, who has felt it his duty to refute certain grave allegations made by Mr. Markham against the parishioners of Shirebrook."

9. It is submitted that the petition is not presented in good faith, but that the petitioner has instituted these proceedings against the vicar being actuated by personal hostility against him by reason of their difference of opinion on secular matters, as shewn in the correspondence between them recently published in the public Press.

10. And the respondents further pray that if the said ornaments, articles, or things require a licence or faculty confirming or authorizing their retention in the church, that the Court will be pleased to direct the issue of such licence or faculty as shall seem meet.

An answer by the petitioner to the objections in detail was filed in the registry on July 4, 1905, and alleged in the first paragraph thereof substantially as follows: "If the said pictures, figure, crucifixes, and bell were in the said church or that part of it which was then consecrated or dedicated at the date of such consecration or dedication (which the petitioner does not admit), such consecration or dedication did not and could not legalize or allow the maintenance of such pictures, figure, crucifixes, and bell in the said church."

The remaining paragraphs of the reply are, so far as material, summarized in the judgment.

Dec. 12, 13, 14, 1905; Jan. 9, 1906. On these days the cause was heard before the Chancellor of the diocese of Southwell (A. B. Kempe, Esq.). (1) Witnesses were examined orally in Court, the petitioner and ten other witnesses called on his behalf giving evidence in support of the petition, and the vicar, both of the churchwardens, and seven other witnesses being called and examined as witnesses for the opponents. The result of the evidence of these witnesses is fully stated in the judgment.

The deputy registrar of the diocese produced in Court the original petition for consecration and the sentence of consecration of the church of The Holy Trinity, Shirebrook, in the year 1844, an office copy faculty, dated 1899, with plans shewing the church before and after the then proposed alteration, the sentence of consecration of an addition to the chancel dated 1899, and an office copy faculty dated 1901.

Copies of the following books and cards were produced and put in evidence: A book called "The Server's Guide," in use in the church of The Holy Trinity, Shirebrook, in the year 1904; a card called "The Preparation at the beginning of the Mass"; a book called "An Altar Book for Servers," A. R. Mowbray & Co., Oxford, ed. 1903; books called "The Legend of the Way of Grief," by the Rev. James G. Adderley, and "Christ on the Cross," by the Rev. J. Edward Vaux; the Shirebrook Parish Magazine, dated April, 1902; three altar cards in Latin, twice used in the church of The Holy Trinity, Shirebrook; and an altar card in English produced by the vicar and used in the same church.

It was admitted that the crucifix in the old part of the church was placed in the position it occupied at the hearing of the suit by the vicar's directions, after having been previously in the vestry.

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(1) The Court sat within the diocese of Southwell, the first three days of the hearing at Mansfield, and the fourth day at Nottingham.

Morton W. Smith, for the petitioner. The petitioner asks that a faculty may be granted for the removal out of the church of The Holy Trinity, Shirebrook, of the whole of the ornaments, matters, and things submitted by the petition to be illegal. They were all placed in the church without lawful authority, as no faculty was ever granted for the introduction of any of them. On this ground alone they ought all to be removed, as the Court in its discretion ought not to decree a confirmatory faculty in respect of church ornaments, concerning which a dispute as to their illegality was certain to arise if an application to authorize them by faculty had been made. Moreover, if any other grounds have to be shewn for their removal, not only have isolated crucifixes been held to be per se unlawful—*Kensit* v. *The Rector and Churchwardens of St. Ethelburga, Bishopsgate Within* (1)—but it has been abundantly shewn by the evidence in this case that the ritual and the ceremonies in use in the church of The Holy Trinity, Shirebrook, are such that the Court must necessarily come to the conclusion that the Stations of the Cross, the crucifixes, and the image of the Good Shepherd are all liable to be abused by superstitious reverence, and ought to be removed out of the church as unlawful church ornaments: *In re St. Anselm, Pinner.* (2)

The bell referred to in the petition ought to be removed out of the church, as the evidence shews that it was in the church for the purpose of being illegally rung during the Communion Service in such a way as to constitute a rite or ceremony other than and additional to those prescribed in the Book of Common Prayer. (3) As to the altar cards, they, like all other articles placed in a church in connection with the services of the church, must, if any question arises as to their being legally in the church, be removed as being there without the sanction of a faculty unless the Court think fit to grant a confirmatory faculty for their retention. Moreover, there is no legal authority for their use in churches of the Church of England.

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(1) [1900] P. 80.

(2) [1901] P. 202.

(3) See *Elphinstone* v. *Purchas*, (1870) L. R. 3 A. & E. 66, at pp. 98, 99.

Hansell and *Hardy* appeared for the opponents. They stated that, it having appeared in evidence that some of the parishioners objected to the use of the sacring bell and the altar cards referred to in the petition, the vicar desired to remove them out of the church and not to use them in future. He would also wish to remove the small marble crucifix. The Court accordingly would only have to give its decision as to the retention in the church of the Stations of the Cross, the image of the Good Shepherd, and the two crucifixes placed near the pulpits in the church. A confirmatory faculty was asked for for the fourteen Stations of the Cross, or at least for the ten Stations for which there was Biblical authority. The whole of the fourteen Stations were in the church at the time of the consecration of a portion of the church in 1899, and as decorative pictures, not of themselves illegal, ought to be allowed to remain; there being no evidence in the present case, as in the cases, of *Clifton* v. *Ridsdale* (1) and *In re St. Mark's, Marylebone Road* (2) that they had been or were likely to be abused by superstitious reverence. The services occasionally held before them were not services associated in any way with superstitious doctrines, and if a confirmatory faculty for the Stations of the Cross should be granted, an application would be made to the bishop of the diocese for his approval of such services under the Act of Uniformity Amendment Act, 1872 (35 & 36 Vict. c. 35). The image of the Good Shepherd referred to in the petition was merely a church decoration, and as it had never yet been, and was not likely in the future to be, abused by superstitious reverence, clearly ought to remain in the church. As to the two crucifixes placed near the pulpits in the church, a confirmatory faculty ought to be granted for their retention. The vicar wished to retain them as a help to preaching and a memorial of a great event; and superstitious veneration had never been paid to them. The cases of *Westerton* v. *Liddell* (3) and *Clifton* v. *Ridsdale* (4), in the Court of Arches and the

(1) (1876) 1 P. D. 316, at pp. 359-62.

(2) [1898] P. 114, at pp. 117-19.

(3) (1855) Moore's Special Report.

(4) (1877) 2 P. D. 276.

Judicial Committee of the Privy Council, are authorities that isolated crucifixes are not per se illegal church ornaments; and although the crucifixes in Holy Trinity, Shirebrook, would, as was done in the case of *Kensit* v. *The Rector and Churchwardens of St. Ethelburga, Bishopsgate Within* (1), have to be removed if there was any danger of their being liable to be abused by superstitious reverence, the evidence is clear that no such danger exists in this case. [They referred to 3 & 4 Edw. 6, c. 10, as to the removal of images which had been abused; The Injunctions of Edward VI. (Cardwell's Documentary Annals, vol. i. p. 25); *Phillpotts* v. *Boyd* (2); *In re St. Anselm, Pinner* (3); *Reg.* v. *Bishop of London* (4); Article 22 of the Articles of Religion.]

Morton Smith replied.

Cur. adv. vult.

Feb. 6, 1906. (5) THE CHANCELLOR. In this case, upon the petition of Mr. Arthur Basil Markham, a parishioner of the parish of Holy Trinity, Shirebrook, in the diocese of Southwell, a citation was issued, on April 6 last, calling upon the vicar, churchwardens, parishioners, and inhabitants of the parish, and all others having interest, to appear and shew cause why a faculty should not be issued to the petitioner, or such other person or persons as the Court might select, requiring them or authorizing him or them to remove certain things from the parish church, and intimating that if no such appearance was entered, or if those who appeared shewed no sufficient cause to the contrary, the Court might, if it thought fit, proceed to decree the grant of the faculty prayed for.

The articles which the petitioner desires to have removed from the church are:

1. Fourteen pictures, commonly called The Stations of the Cross; 2. an image of Our Saviour as The Good Shepherd; 3. three crucifixes; 4. a sacring bell; 5. altar cards.

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(1) [1900] P. 80.

(2) (1875) L. R. 6 P. C. 435, at pp. 466, 467.

(3) [1901] P. 202, at pp. 214-18.

(4) (1889) 24 Q. B. D. 213; [1891] A. C. 666 (nomine *Allcroft* v. *Bishop of London*).

(5) The Court sat by consent at the Church House at Westminster.

He alleges in his petition that these several articles are illegal, and have been illegally placed in the church, are all liable to be subjected to superstitious uses, and are naturally conducive to such uses, or are kept in and used in the church for the purposes of being used, and are used, in connection with ceremonies and services which are contrary to the provisions contained in the Book of Common Prayer.

In answer to the citation an appearance has been entered on behalf of the Rev. Edward Braddon, the vicar of Holy Trinity, the churchwardens, Mrs. Helen Elizabeth Paget, the patron of the benefice, and a number of other parishioners, and these opponents have filed objections to the issue of the faculty asked for by the petitioner, which are in substance as follows: [The Chancellor read the objections as above set out and continued:—]

In his reply to these objections the petitioner traverses generally the allegations made in them, and submits that paragraph 9 of the same is untrue, and affords no answer to the petition. He also alleges that the consecration of 1899 was merely of an extension of nine lineal feet of the chancel, and not of the whole church as it then existed, that the dedication of April 30, 1904, had reference only to an enlargement of the church under a faculty dated June 20, 1901, and that if any of the articles now in question were in the church, or that part of it which was consecrated or dedicated at the date of such consecration or dedication, which he does not admit, such consecration or dedication did not or could not legalize or allow the maintenance of those articles in the church.

He also contends that no confirmatory faculty ought to be granted as asked for by the opponents, as the articles in respect of which it is asked for are such as it is illegal to allow to be placed in the church.

The case was heard by me at Mansfield on December 12, 13, and 14 last, when a considerable body of evidence was given on behalf of both parties to the suit. At the request of both sides I visited the church on January 8 last, and at a sitting of the Court held at Nottingham on January 9 I heard the arguments of counsel and reserved judgment, which it has been agreed that I shall deliver here in London.

Holy Trinity Church, Shirebrook, was consecrated in 1844 as a chapel of ease of the parish of Pleasley. In 1849 a separate district was assigned to the chapel, which has now become the parish church of a separate ecclesiastical parish, having a population of about 10,000 persons. On November 8, 1899, a small extension of the east end of the chancel, which had been made under the authority of a faculty, was consecrated by the bishop. On June 20, 1901, a faculty was granted for the addition of a large new transept to the church on the north side, which transept was intended ultimately to become the nave of the church; and on April 30, 1904, a service of dedication of this new transept was held by the late Bishop Ridding. As the transept was merely an addition to the existing church built, under the authority of a faculty, on consecrated ground, no formal consecration was needed or held. The faculty did not authorize the formation of a new chancel, but a temporary one has been erected at the east end of the transept, and a Holy table placed in it, which is now used as the principal Holy table of the church. A new pulpit has been erected in the transept, which now forms the nave of the church, the old portion of the church forming a side aisle. The original Holy table still stands in the old chancel, and the original pulpit remains at the south-east corner of the old church, but is now rarely used.

The present incumbent, the Rev. E. Braddon, became vicar of the parish in 1899. His predecessors were Mr. Ware, who held the benefice from 1881 to 1892, and Mr. Buchanan, who did so from 1892 to 1899. Though some of the witnesses appeared to think that Mr. Braddon had made no great changes in the services, there can be little doubt that he has introduced ritual practices which have led to the resignation of both churchwardens after many years' service, and have compelled some parishioners to leave their church and go elsewhere. It is, however, no part of my duty in this case to try Mr. Braddon for alleged breaches of the Acts of Uniformity. I do not propose, therefore, to enter upon a consideration of these practices save in so far as may be necessary for the purpose of determining the sole question which is before me, viz., whether any and which of the articles specified in the petition must be removed from the church.

The petitioner, Mr. Markham, is a parishioner of Shirebrook parish church, and has been so for seven or eight years. He does not attend the church, but he says that he and his family have been prevented from doing so by the excessive ritual which prevails there. As member of Parliament for the Mansfield division he has been pressed by a number of his constituents to take steps to put a stop to this, and he has in consequence given evidence as to it before the Royal Commission now sitting on the subject, and has taken these proceedings. It is alleged in the objections filed by the opponents that he has been actuated by improper motives in so doing—by personal hostility to the vicar, by reason of differences of opinion on secular matters. But the opponents have not pressed the allegation, and merely insist now that his main motive is political. I can see no reason for treating the action of Mr. Markham as other than perfectly straightforward and proper, and in accordance with his right and duty as a parishioner.

He asks the Court to say that certain articles now in Shirebrook Church ought to be removed, and to give effect to its decision by decreeing the grant of a faculty for their removal.

It is clear that every one of these articles was introduced into the church without any faculty having been obtained for the purpose.

It is suggested, however, by the opponents in their pleading that, with the exception of the altar cards, the retention in the church of all the articles must be taken to have had episcopal sanction, because the Stations of the Cross, the figure of the Good Shepherd, one of the crucifixes, and the sacring bell were in the church before the consecration of 1899, and the other two crucifixes were there before the dedication in 1904.

It is now admitted that one of the crucifixes was not introduced into the church until the day after the dedication in 1904, and there is no evidence at all that any of the other articles were in the small portion of the church which was consecrated in 1899, or that the attention of the bishop was ever called to any of the articles in the church at that date, or at the dedication in 1904. There is certainly no evidence that he on either occasion either formally or informally approved of their presence in the church. Under these circumstances the following passage from the judgment of

Dr. Lushington in the case of *Westerton* v. *Liddell* (1) appears to me to effectually dispose of the suggestion, which was not, indeed, seriously pressed:—"It has been urged that many of the things now complained of were placed in this, or other churches, prior to the consecration thereof; and that the Bishop, by the acts of consecration, stamped them with the approbation of their authority. I cannot ascribe much weight to this argument, and I think for reasons as obvious, as they are to my mind conclusive. Unless the Bishop at the time of the consecration had present to his mind all the matters which are now in dispute, the mere act of consecration would be no evidence of approbation; for approbation can be founded only on knowledge and intention. Considering the duty the Bishop is performing, it cannot reasonably be supposed that, unless his attention was specially called thereto, he would bestow his consideration on things of this description. He is assured by the petition presented to him 'Omnia rite esse acta,' and is justified in acting on that presumption. But I will also add, that, whenever a Bishop is called upon to consecrate a new Church, and there are therein at the time ornaments of any description not in accordance with common and ordinary usage, it is the duty of those who apply for consecration to draw the attention of the Bishop to such ornaments, that he may advisedly exercise his own discretion with regard to them. How little indeed the mere act of consecration practically affects the question has been recently evinced by the conduct of a Right Rev. Prelate, the Bishop of Gloucester and Bristol, who has not hesitated to consecrate the new church at Bedminster, though it contained an ornament not free from objection, the removal of which he requested in vain. After consecration, says his Lordship, if any ornaments be judged superstitious or improper, they will be removable by a decree of the Ecclesiastical Court." (2) I must take it, then, that the whole of the articles now in question have been introduced into the church without legal authority, and that no episcopal sanction, direct or indirect, has been given for their retention there. (3)

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(1) Moore's Special Report.

(2) *Westerton* v. *Liddell*, Moore's Special Report, pp. 21-22.

(3) See *Davey* v. *Hinde*, [1901] P. 95, at p. 116.

It does not appear to me to be material, in the view which I take of the case, to discuss minutely the composition either of the vestry of eleven persons who passed the resolution of April 25, 1905, or of the body of parishioners who appear here as opponents. Nor need I inquire into the circumstances which have led the latter to give their names as opponents. In view of the evidence which is before me it is impossible to treat the opposition as indicating, as regards any of the articles upon which I have to adjudicate, a general desire on the part of the parishioners that they should remain in the church. No doubt there are many who desire that some, if not all of the articles, should be retained, but it is clear that there are others whose wishes are quite in the other direction. How many may be of one opinion and how many of the other is immaterial. It *is* material that the desire for retention is certainly not a general one on the part of the church-going parishioners. I proceed now to consider the various articles in detail.

The Stations of the Cross were presented to the church by the opponent Mrs. Paget about twenty years ago, i.e., during the incumbency of Mr. Ware. They consist of fourteen pictures in plain wooden frames, each surmounted by a small cross. Ten of the pictures represent scenes of our Lord's Passion which are recorded in the Gospels. The other four are uniform in character with the ten, and are interspersed with them, but represent incidents which are legendary and have no warrant in Gospel history, viz., what are known as the three falls of our Lord when bearing the Cross, and the incident of St. Veronica, who is said to have wiped the face of the Saviour with her handkerchief, which miraculously retained a representation of His countenance. These pictures were hung upon the walls of the old church, and when the new portion was added in 1904 eight of them were moved by Mr. Braddon to the positions in it which they now occupy, the other six remaining on the south wall of the old church.

There is no evidence as to whether there were or were not any services held in connection with the pictures during the incumbencies of Mr. Ware and Mr. Buchanan. One witness says he did not think that any such services were held, but he could not speak positively. It is admitted, however, that such services have been held by the present vicar, Mr. Braddon. From his own evidence it appears that they have been held each year of his incumbency on the Wednesday and Friday in Holy Week. He thought he had also once "taken the stations with the children." The services used were not the same on all occasions, but were taken either from a small book written by the Rev. J. G. Adderley, and called "The Legend of the Way of Grief: Thoughts for Meditation on the Stations of the Cross," or from another by the Rev. J. E. Vaux, entitled "Christ on the Cross: a Good Friday Manual of Meditations and Prayers for Church and Home Use, with the Reproaches, Way of the Cross, and Three Hours' Agony." These manuals contain prayers and meditations to be used before each station, where Mr. Vaux's book indicates that a kneeling posture should be adopted, and a verse of a hymn to be sung on passing from one station to another, viz.:—

> From pain to pain, from woe to woe
> With loving hearts and footsteps slow
> To Calvary with Christ we go.
> See how His precious Blood
> At every Station pours;
> Was ever grief like His!
> Was ever sin like ours!

The opening prayers were said and a short address delivered at the chancel steps. A procession, headed by a cross-bearer, was then formed and proceeded round the church to the first station, singing a hymn. An address was given by the minister on the subject of the stations, in place of the meditation in the book, the prayers, including the prayer "O Saviour of the world," from the Order for the Visitation of the Sick, were offered up, and the procession proceeded, singing the verse I have quoted, to the next station, where the same course was pursued, and so on. It was not usual to go to all the stations on one day. Half were visited on the Wednesday in Holy Week and the remainder on Good Friday.

In answer to questions put to him by the Court, Mr. Braddon admitted that he had never submitted the services used in connection with the stations to the late bishop. He had not done so because he imagined that they were such well-known services in the English Church that no exception could be taken to them. He wished to retain the pictures because they had been so long in the church. If allowed to do so he should ask the present bishop to permit him to have a service in connection with them, but if he refused he would not hold the service. He considered that for the larger part of the year the pictures were purely decorative, but he would wish to retain them for services in Holy Week.

It must be added that it is manifest from the two books I have referred to, both of which were put in evidence, that they contemplate the use of the Stations of the Cross for private devotions as well as public services. The preface to Mr. Adderley's book, after stating that "It is becoming more and more common to meditate on the fourteen Stations of the Cross. . . . . I have tried to put together a few points for meditation on this most sacred and touching subject," adds, "I hope, too, that the book may be useful to those who are in the habit of leading the service of the Stations in a Church, or preaching about them in the streets, or at a lantern mission service." And in Mr. Vaux's manual the preface, which bears date "Septuagesima, 1873," says that "'The Way of the Cross' has been drawn up, not merely as a private form of devotion, but also with a view to its public use as an office of the Church; the precatory portions are therefore verbatim extracts from the Book of Common Prayer." The edition of this manual which was put in evidence, that of 1898, is marked "31st thousand."

Mr. Braddon stated that when speaking to the children about the stations he "always" told them which were Biblical and which were traditional. On other occasions he sometimes dwelt on the fact that some were legendary and some not; and would probably dwell on the St. Veronica incident being legendary. It is noteworthy, however, that one of the present churchwardens, while aware that four of the pictures are not Biblical, said, "I do think the whole correctly represents the teaching of the Church," and "I do approve of their being retained as shewing the teaching of the Church"; that a sidesman said, "I think that the pictures correctly represent the teaching of the Church with reference to our Lord's Passion. That opinion is formed in consequence of the teaching I have heard in Shirebrook Church"; while another sidesman said, "I have considered whether the fourteen pictures express the Church's teaching, and I consider that they do. I consider they represent actual things recorded in the Bible. If they do not I think they should not be in the church"; and the other churchwarden, a schoolmaster, said, "I think the Stations of the Cross very helpful for teaching young children, though I have not taught the children from them. I think they are scripturally correct. That is my belief."

In view of these facts, and of the further most significant circumstance that those who introduced the pictures into the church either did not venture to seek for the sanction of a faculty before doing so, or, if they did, failed to obtain it, I cannot come to the conclusion that these fourteen pictures were set up in Shirebrook Church for the purpose of decoration only, or merely to fulfil the purpose which all pictorial representation of sacred subjects in a church must necessarily serve, namely, that of reminding observers of the events which they portray. I must take it that they were placed in the church as a set of Stations of the Cross, intended to take a place or play a part in devotions to be paid to the Deity before them. It is, moreover, established that they have in fact during the past six years been so used in public services; and, with the manuals of Mr. Adderley and Mr. Vaux before me, I cannot bring myself to think the stations, the legendary as well as the Biblical ones, have not been privately used by individual worshippers in the same manner, and are not, if retained in the church, likely to continue to be so used.

With these conclusions in mind, I turn to the consideration of the law bearing on the subject. The general law with regard to images, pictures, or other representations of sacred persons or objects is well settled. "It is important," said the Judicial Committee of the Privy Council in *Ridsdale* v. *Clifton* (1), "to maintain, as to representations of sacred persons and objects in a church, the liberty established in *Phillpotts* v. *Boyd* (2), subject to the power and duty of the Ordinary so to exercise his judicial discretion in granting or refusing faculties, as to guard against things likely to be abused for purposes of superstition."

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(1) 2 P. D. 276, at p. 353.
(2) L. R. 6 P. C. 435.

The liberty established in *Phillpotts* v. *Boyd* (1) is thus defined by Sir Arthur Charles in *In re St. Anselm, Pinner* (2): "In the result, the conclusion arrived at was that sculptured representations of sacred subjects, if set up for the purposes of decoration only, are not in themselves unlawful in the Church of England; but they are unlawful if set up under circumstances which induce a just and reasonable apprehension that they are likely to be made the object of superstitious reverence and regard." And the nature of the "superstitious reverence" here referred to is explained by Lord Penzance in the case of *Clifton* v. *Ridsdale*. (3) After pointing out that the words "superstitious reverence," "idolatrous practices," together with the more general term "abuse," are used indifferently by the Court in *Phillpotts* v. *Boyd* (1), and as meaning the same thing as "worship" and "adoration" which are found in the 22nd Article of Religion, and after discussing the meaning of the words as there used, he proceeds as follows: "It was not, therefore, intended in the above decision of the Court of Appeal by the use of the words 'superstitious reverence,' 'adoration,' or 'worship,' to convey only the limited idea of a figure or object itself worshipped like a pagan idol. On the contrary, I understand these expressions as intended to embrace the far more extended conception of worship, adoration, or reverence paid to the Deity in presence of or before those objects or figures. It may not be easy to push definition further than this, and define what it is that in any, or every case, constitutes adoration or worship in presence of an image or figure; nor is it necessary to do so; it is enough for the purpose in hand to say that it must be taken to include all and every form or degree in which the object in question is made to take a place, or play a part, in the devotions which are paid to the Deity before it."

This being the law, I am bound to hold that as they now stand, these Stations of the Cross cannot be allowed to remain in the church. They must, as I have said, be taken to have been put up, not for the purpose of decoration only, but in order to take a place or play a part in devotions paid to the Deity before them. They have in fact served this latter purpose, and are likely, if retained in the church, to continue to do so. In saying this I have not forgotten that the vicar stated that he should not continue to use the pictures in connection with public services, unless he had the consent of the bishop of the diocese to his doing so. I cannot assume that the bishop is likely to give this sanction. If the law is as I have stated it, it is difficult to see how the bishop could give permission for the holding of such services, even in connection with the pictures which are Biblical, and not legendary. If pictures cannot lawfully be set up for the purpose of taking any place or playing any part in devotions paid to the Deity before them, it could hardly be lawful to authorize the use of such services in connection with the pictures already set up. But it is not merely the use of the pictures in public services that I have to consider. If this is abandoned there remains the likelihood, so long as these pictures retain their character of a set of Stations of the Cross, of their being used for private devotions.

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(1) L. R. 6 P. C. 435.

(2) [1901] P. 202, at p. 216.

(3) 1 P. D. 316, at pp. 351, 352.

Moreover, in view of the evidence given by witnesses who attend the church, as to their belief that all the pictures are Biblical, it is obviously undesirable that the Court should sanction the four legendary pictures remaining in association with the others.

Mr. Hansell, on behalf of the opponents, has asked that, if the Court is not prepared to decree the grant of a confirmatory faculty for the retention of the whole set of pictures, it will at least sanction the retention of the ten which are Biblical. Assuming, however, as I am by no means satisfied would be the case, that the removal of the four legendary subjects would deprive the pictures of their present character of a set of Stations of the Cross, intended to be used for the purpose of the meditations and devotions of the "Way of the Cross," there would remain to be considered whether the remaining ten are suitable decorations for the church at all. The church has recently been greatly enlarged, and is now a building possessing internally considerable pretensions to architectural dignity. If this were an original application for a faculty to introduce the ten pictures into the church, I should on purely decorative grounds hesitate to give the sanction of the Ordinary to the suspension from the walls of the church of pictures such as they are, and I should certainly not do so unless I had before me evidence of a general wish on the part of the churchgoing parishioners that on some special grounds their introduction into the church should be authorized. If this introduction were once effected under the authority of a faculty, difficulties would arise if their removal were subsequently desired. I cannot, to say the least, regard this application for a confirmatory faculty in any more favourable light than that in which I should consider an original application; and as I cannot possibly come to the conclusion that the evidence shews that a general wish for the retention of ten of these pictures exists, I cannot decree such a faculty. The removal of the whole fourteen pictures must therefore be authorized.

The conclusion I have thus come to is in entire accordance with the decision of Lord Penzance, in the case of *Clifton* v. *Ridsdale* (1), with regard to the Stations of the Cross with which he had then to deal. That case is not, however, a direct authority binding upon me here, as the decision of the learned judge, who had apparently no evidence of any user of "the stations" before him, was arrived at on a consideration of two Roman Catholic books of devotion which shewed the "character and objects of the pictures in question as used among Roman Catholics." There is no such evidence before me, and it therefore forms no part of the materials upon which I base my decision.

I have, secondly, to consider the image of the Good Shepherd. This is a small figure standing on a bracket under a canopy, the whole made of oak and uncoloured. It is affixed about ten feet from the ground, to the east wall of the old portion of the church, on the south side of the old chancel arch. It has all the character of a mere architectural decoration, and an inspection of it and of its position has certainly not conveyed to my mind the impression that it has been put up for any

(1) 1 P. D. 316.

superstitious purpose or is in the least likely to give occasion for superstitious reverence in any form. There is no suggestion that any services have been held in connection with it, but it is said, on the evidence of one witness, that on one occasion in the course of a procession which was coming down from the old chancel into the old nave the vicar turned and bowed to it; and on the evidence of another witness that the vicar on several occasions, and a curate twice, when coming from the vestry and leaving the church, also turned and bowed to the figure. The vicar emphatically denies that he did anything of the sort, and, after inspecting the church, I have come to the conclusion that the two witnesses have supposed that obeisances carelessly made towards the Holy table in the old chancel were made to the figure.

The figure was, no doubt, erected without a faculty, but it was so erected long before Mr. Braddon became vicar, and has been in the church for nearly fourteen years. Under these circumstances I do not feel justified in compelling its removal. The faculty will authorize its retention.

I come next to the three crucifixes. One of these had been placed in the vestry before Mr. Braddon became vicar. There is no evidence as to when it was placed there. Mr. Braddon removed it from the vestry and placed it in the church immediately over the pulpit which stands at the south-east corner of the old portion of the church. He subsequently placed another crucifix in the vestry, on a chest of drawers containing the eucharistic vestments which are used by him in the church; and when the new transept was built and a temporary vestry made in it behind the organ, he removed the chest of drawers and crucifix to the entrance of this vestry where they now stand, and are visible from the new temporary chancel and part of the church, but not to the main body of the congregation. He raises no objection to the removal of the latter crucifix, and, as no confirmatory faculty is now asked for in respect of it, its removal must be authorized. The third crucifix hangs from a column in the new transept, immediately over the new pulpit, that which is generally used. It was placed there, as already stated, on the day after the bishop dedicated the transept in 1904. This crucifix, then, and that which hangs over the old pulpit were both introduced into the body of the church, and placed in view of the congregation by the present vicar, without any faculty having been applied for or granted to justify their erection. On this ground I must accede to the prayer of the petition and authorize their removal.

I do not propose to discuss the circumstances (if any) under which isolated crucifixes can lawfully be erected in our churches. For assuming that there may be cases in which their erection would not be illegal, it is certain that it should not take place, unless previously authorized by a faculty decreed by the Ordinary, in the exercise of his discretion, after a careful inquiry. The idea that the incumbent of a parish can with impunity introduce into the parish church, on his mere individual view of what is expedient and proper, something which the Ordinary in the exercise of his discretion might decline to sanction, and which may be utterly distasteful to those for whom the church is provided, and that in so doing he incurs no danger of having the object removed, so long as it is not actually unlawful, but merely runs the small risk of being possibly compelled to bear the expense of obtaining a confirmatory faculty, is one which the Court is bound to dispel.

Crucifixes, though considered by Mr. Braddon as customary and important for the decent furnishing of pulpits, and, by one of the present churchwardens, as necessary to be provided in all churches, because they are almost indispensable to the proper teaching of the Catholic faith, must be regarded, to say the least, as such unusual adjuncts of the pulpits of churches of the Church of England that one ought not in any case to be authorized unless there be a very general desire on the part of the church-going parishioners that it should be. In the present case there is nothing to satisfy me that any such general desire exists; on the contrary, there is sufficient evidence that it does not. The grant of a confirmatory faculty for the retention of these crucifixes is therefore out of the question, and I must accede to the prayer of the petitioner as regards them also.

The "sacring" or "sanctus" bell was introduced into the church in 1899, also by Mr. Braddon, and without the authority of a faculty. It stands on the steps in the temporary chancel in front of the Holy table, and has been used in connection with and during administrations of the Holy Communion.

The evidence as to the altar cards shewed that a set of three such cards, all in Latin, stood on the Holy table in the temporary chancel, and were in use on Sunday, October 1, 1905; but it was explained by Mr. Hansell that these were there on two Sundays only. They were introduced by a curate, and were ordered away by the vicar. The vicar produced another card, a single one with three folds, which was in English and was in use. The interior folds of the card contain the Prayer of Consecration from the "Order for the Administration of the Lord's Supper" in the Book of Common Prayer, with preceding and following prayers which assimilate it with the Canon of the Mass, and also a prayer to be said on "placing a particle of the Species of Bread in the Chalice." On the exterior of the two outside folds there are prayers, among others, to be offered on "Benediction of Incense at Solemn Service," "On mixing the Water and the Wine," by "The Priest washing his hands," "On taking the ablutions," and "On offering the Oblations," the prayer which bears this last heading being as follows: "Receive, O Holy Trinity, this oblation which I, an unworthy sinner, offer in Thine Honour, and that of Blessed Mary and all Thy Saints, for my own sins and offences, for the salvation of the living and the repose of the faithful departed. Let this new sacrifice be acceptable to Almighty God. In the Name, &c."

In the course of the hearing Mr. Hansell, on behalf of Mr. Braddon, while contending that no faculty was necessary for the introduction into the church either of the bell or cards, and that they were perfectly legal, stated that, in view of the opposition that there appeared to be on part of certain parishioners to the use of these, the vicar was prepared to withdraw them from the church, and to give an undertaking not to use them again. It is unnecessary therefore for me to discuss these articles further. The faculty will authorize the vicar to remove the bell and card.

In the result, then, the Court, understanding that the vicar desires himself to remove the bell and card and also the crucifix which stands at the entrance of the temporary vestry, decrees that a faculty issue authorizing him so to do within fourteen days after the date of the issuing of the faculty. The same faculty will authorize the churchwardens to remove the Stations of the Cross, and the two remaining crucifixes within the same period, and will confirm the retention of the figure of the Good Shepherd in its present position. The faculty will also provide that in the event of the vicar or churchwardens failing to remove any of the articles within the time specified, the petitioner shall be empowered to remove them.

The Court has come to the conclusion that the opponents must pay the petitioner's costs.

Against the decree entered on the minutes in pursuance of this judgment, the opponents asserted an appeal apud acta to the Arches Court of Canterbury, and on February 25, 1906, the registrar of the Consistory Court of Southwell, on the application of the solicitors for the opponents and in consequence of the Rules and Regulations of the Arches Court issued September, 1903 (1), having done away with the necessity of the appellants bringing into the Registry of the Court of Arches a libel of appeal according to the old practice (2), transmitted to the registrar of the Arches Court a signed certificate of the appeal having been asserted apud acta, whilst on February 28, 1906, the solicitors for the opponents personally served the Chancellor of the diocese of Southwell with an inhibition pending appeal, and a monition to transmit process to the Dean of the Arches.

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(1) These rules and regulations made under the powers of 10 Geo. 4, c. 53, s. 9, are in terms as follows:—

"1. All appeals to the Court of Arches in cases of application for a faculty shall be by way of rehearing, and shall be asserted in manner provided by rule 23 of the Rules and Regulations made 1st January, 1867. Such appeals shall be prosecuted within the time mentioned in the said rules, by the appellant applying for an inhibition pending the appeal; and on such inhibition being granted the Judge shall proceed to appoint a day for the hearing of the appeal."

"2. Saving as aforesaid no petition, plea, or other formal proceeding shall be necessary in respect of such appeal."

"3. Rule 34 of the said rules and regulations shall not apply to appeals in cases of application for a faculty." [The Arches Court Rules of January, 1867, are printed at length in 36 L. J. Eccl. p. 1.]

(2) See *Boyd* v. *Phillpotts*, (1874) L. R. 4 A. & E. 297, at p. 325.

The opponents, however, on March 4, 1906, gave notice of the discontinuance of the appeal, and, the appeal having been discontinued, no further proceedings were taken therein.

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MARKHAM
v.
SHIREBROOK
OVERSEERS.

Solicitors for petitioner: *Campbell, Hooper & Todd.*

Solicitors for opponents: *Brooks, Jenkins & Co.*

C. F. J.

THE VELOX.

1906
May 7.

Admiralty—Salvage—Different risks to Ship, Cargo, and Freight—Separate Awards.

A Norwegian steamship bound to Hull with fresh herrings ran short of coal when some hundred miles north-east of the Spurn, and was towed into the Humber by a steam trawler. The Court awarded the salvors 600*l.*; but, regarding the substantial service as rendered to the perishable cargo, divided this sum into 180*l.*, as against the ship, valued at 1875*l.*, and 420*l.* as against the cargo and freight, valued at 1060*l.* and 136*l.* respectively.

ACTION OF SALVAGE.

The plaintiffs were the owners, master, and crew of the *Vulcan* The defendants were the owners of the *Velox*, her cargo and freight.

The case is reported on the question of making separate awards against ship, cargo, and freight, where the risks to which these are exposed are different.

On January 17, 1906, about 2 P.M., the wind being westerly, strong, with some sea, the Grimsby steam trawler *Vulcan*—of 206 tons gross register, engines of 400 horse-power effective, a crew of nine hands, and valued at 6000*l.*—was fishing in the North Sea on the lower edge of the Dogger Bank with her gear down, when a vessel was observed to the southward which proved to be the Norwegian steamship *Velox*, of 312 tons gross register, 50 nominal and 186 horse-power indicated, from Gravningsund, in Sweden, to Hull with about 170 tons of fresh herrings, and manned by a crew of eleven hands. She had run short of coal and was exhibiting the signal X U ("Can you take me in tow")? Shortly afterwards she came up to the *Vulcan*, which took in her gear, and lowering a boat sent her mate on board the *Velox*; but, owing to darkness coming on, it was found impracticable to make fast that night. The next morning, after three attempts, a warp from the *Vulcan* was attached to the anchor chain of the *Velox*, and about 8 A.M. towage towards the Humber commenced, the Spurn being then upwards of 120 miles to the west-south-west. The wind increased during the day, and blew hard as night came on. About noon on January 19 Newsand Light was made, and about 2.30 P.M. the Bull Lightship was passed. About 5 P.M. the *Velox* took a pilot on board; but about the same time the warp broke, and the *Velox* had to let go her anchor. She was subsequently towed up to Hull by a tug sent by the plaintiffs.

It was alleged by the salvors that the prompt rendering of their services saved the *Velox*, with her cargo and freight, from probable total loss; that the towage was heavy in the bad weather then prevailing; that the profits, estimated at 125*l*., on six days' fishing had been lost; that the damage to warps amounted to 28*l*., extra coals, engine-room stores, and wasting of ice 13*l*. 17*s*. 6*d*., repairing engines, 20*l*., and towage of *Velox* from Grimsby Roads to Hull 29*l*., making a total of 215*l*. 17*s*. 6*d*.

The defendants admitted that services of a towage character had been rendered to the *Velox*, her cargo and freight, but contended that though, in consequence of heavy weather and strong head winds, the vessel had consumed an abnormal quantity of coal so that only three tons were left, she was in no danger, was undamaged, well equipped, and could have returned to Norway under sail, and that it was only the fear that, if the voyage were unduly protracted, the ice, in which the cargo was packed, would melt and the herrings deteriorate, that induced those in charge of the *Velox*, on sighting the *Vulcan*, to accept her assistance in order to accelerate the voyage to the port of discharge for the benefit of the cargo; that the propeller of the *Velox* was disconnected so that she followed well in the wake of the *Vulcan*; that the expenses alleged to have been incurred and the profits alleged to have been lost were exaggerated, and the sum paid by the plaintiffs for the tug exorbitant; and the defendants tendered and paid into Court the sum of 300*l*. as sufficient to satisfy the whole of the plaintiffs' claim.

The value of the *Velox* at the time of the services in question was sworn at 1875*l.* The net proceeds of the sale of the cargo of fresh herrings—in 2011 boxes packed in ice and consigned to various parties in Hull, with which the *Velox* had left Gravningsund on January 13, and of which the contents of 179 boxes were condemned—were 1060*l.*, and the net freight at risk 136*l.*, making a total of 3071*l.*

Aspinall, K.C., and *Dawson Miller*, for the plaintiffs, the owners, master, and crew of the *Vulcan*.

Lauriston Batten, K.C., *A. E. Nelson*, and *E. C. Trehern*, for the defendants, the owners of the *Velox*, her cargo and freight.

SIR GORELL BARNES, PRESIDENT. The *Vulcan* fell in with the *Velox* on the edge of the Dogger Bank, and it turned out that the *Velox* had practically no coal—only a very trifling quantity of coal—left in her, and she asked the *Vulcan* to tow her to Hull. The importance of the towage, according to the evidence, was that the defendants' vessel had on board a quantity of herrings, of considerable value, and that if that cargo was kept out at sea for any lengthened period beyond that time it would deteriorate, probably, so as to become valueless. The *Vulcan* accordingly made fast to the *Velox*, and the towage proceeded to off Grimsby. It is said that the distance towed was 160 miles. I do not know that it makes very much difference whether the distance was a little more or a little less. There is no doubt that during a part of the time the weather was very bad, and this service was the means of bringing this vessel into port, and more particularly of saving her cargo. In doing this the owners of the *Vulcan* have sustained loss. They have put down, I think, a somewhat excessive claim for loss of fishing, because they do not seem at that particular time and previously to have done quite so well as this claim would make out. At any rate there was loss of fishing, though the exact value would depend upon the markets. There was also damage to warps, &c., and some damage to the engines, and there was a payment for the towage by the tug from Grimsby Roads to Hull. Altogether there was a considerable amount of expenditure.

I have considered with the Elder Brethren who are assisting me what was the risk to which the defendants' property was exposed; but after stating the nature of the services, and the sort of weather encountered, it is not difficult to form an opinion of the difficulty of rendering the services; the actual danger to the defendants' property, however, requires consideration. The *Velox* was tight enough, and I suppose that the real difficulty she was in was that of drifting about, and possibly incurring a greater amount of salvage, because she could not have got into port by herself. Where she would have sailed or drifted to it is impossible to be certain, and that is the class of peril she was rescued from.

With regard to the cargo it is very different. It was a perishable cargo, and as far as the evidence goes—and it is not contradicted—if this cargo had not been brought into port on the Saturday, and had been kept out even a couple of days more, it would have become useless. Therefore the risk to the cargo was in my view really more serious than the risk to which a derelict is exposed, because a derelict is floating about and may be picked up, though she has no one on board her. This cargo was in danger of becoming absolutely lost unless it were taken into port. The log-book says that with a view of saving the cargo they wanted to be towed into Hull. This brings me to the consideration of the tender, and the amount which ought to be paid. The value of the salving property is 6000*l.*, and that of the salved property 3071*l.*, made up of ship 1875*l.*, cargo 1060*l.*, and freight 136*l.*

It appears to me that the tender of 300*l.* would have been sufficient if I were dealing with the case of the ship alone; but I have to consider the case of the ship and cargo, and I propose to take a course in this case, which is not perhaps common, but which seems to me to be in accordance with sound principles. I propose mainly to have in view in making my award the real danger from which the different properties were rescued. The ship was not rescued from anything like the same danger as the cargo, because she was rescued from the possibility of floating about and getting ashore, or of being picked up by somebody else. The cargo was rescued not merely from that particular risk, but also from the risk of floating about until it became rotten and perfectly

1906

THE VELOX.

The President.

valueless. Giving this matter the most careful consideration I can, I think the proper award to make is to award separately against the ship 180*l.*, and against the cargo and freight—because the freight would have perished with the cargo—420*l.* That makes 600*l.* altogether.

Solicitors for plaintiffs: *Stokes & Stokes, for Bates & Mountain, Grimsby.*

Solicitors for defendants: *Stanton & Hudson, for Andrew M. Jackson & Co., Hull.*

T. L. M.

COX *v.* COX AND WARDE.

1906
May 15.

Adultery—Claim for Damages only—Principles and Practice applicable to such a Petition—Matrimonial Causes Act, 1857 (20 & 21 *Vict.* c. 85), *ss.* 31, 33, 59.

A petition by a husband claiming damages only presented under s. 33 of the Matrimonial Causes Act, 1857, is subject to the same provisions as other petitions presented under the same Act.

Where, therefore, a husband presents a petition for damages only and has himself been guilty of a matrimonial offence, which, in the exercise of the discretion vested in the Court, would lead the Court to refuse to grant him a decree in a suit if a dissolution of the marriage were claimed by him, he is, on the like ground, debarred from recovering damages from the adulterer.

THIS was a petition presented by the husband under s. 33 of the Matrimonial Causes Act, 1857, claiming damages against the adulterer, but asking for no relief as against the wife.

The petitioner and his wife were married in 1884, and about 1896 they made the acquaintance of the co-respondent.

In June, 1898, a deed was executed providing for a temporary separation of six months' duration, as from April 1, 1898.

The husband did his best to induce his wife to return to him but, as a fact, the married life ended with that deed of separation.

In 1899, the husband having, as it was alleged, discovered certain facts, filed a petition for divorce, making Warde co-respondent.

1906

Cox v. Cox and Warde.

The wife filed a cross petition for divorce on the ground of cruelty and adultery.

These suits were terminated by the execution of a permanent deed of separation dated March 28, 1900.

In 1905, the husband having discovered, as was alleged and as was proved to be the fact, that the co-respondent was living with his wife and had had two children by her, filed the present petition against the adulterer.

Answers were filed denying the adultery and making counter-allegations against the petitioner of condonation, connivance, cruelty, and adultery.

Upon a summons to strike out the answer of the wife on the ground that she had no locus standi and could not have pleaded in an action for criminal conversation, and, further, asking that certain pleas in the answer of the co-respondent which, as suggested, would not have been admissible in that form of action should also be struck out, no order was made, but the questions were left to be dealt with by the judge at the trial.

The case having been opened on behalf of the petitioner, and adultery being thereby admitted, the Court interposed.

Sir Gorell Barnes, President. Have you opened any case for damages? In *Bernstein* v. *Bernstein* (1) the Court of Appeal held that, where a decree was refused, the petitioner was not entitled to damages. Sect. 59 of the Matrimonial Causes Act, 1857, abolished actions in England for criminal conversation.

Marshall Hall, K.C. (*Durley Grazebrook* with him), for the petitioner. Sect. 59 of the Matrimonial Causes Act, 1857, appears to have been repealed by the Statute Law Revision Act, 1892 (55 & 56 Vict. c. 19). If the language of the judgments in *Bernstein* v. *Bernstein* (1) is to be adopted in its entirety and is to be held to cover such a case as this, it is conclusive both here and in the Court of Appeal. *Ramsden* v. *Ramsden and Luck* (2) was a claim by the husband for damages only, and in that case, although the husband's adultery was admitted, Sir James Hannen left the question of damages to the jury. That

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(1) [1893] P. 292.

(2) (1886) 2 Times L. R. 867.

1906

Cox v. Cox and Warde.

case does not appear to have been cited in *Bernstein* v. *Bernstein* (1), and it certainly was not referred to in *Story* v. *Story and O'Connor* (2), where the question of damages being dependent on decree was decided without any argument whatever. The question of discretion, it is submitted, does not arise upon a petition for damages only; but if the Court holds otherwise, the petitioner would ask the Court to say, after hearing the evidence, that if this were a petition for divorce it would exercise the discretion in his favour.

The register of births having been produced and the signatures of Warde and Mrs. Cox, as the informants, having been proved and admitted, the petitioner in his examination-in-chief and in answer to the learned President admitted that some time after his wife separated from him he had committed adultery with a woman named in the pleadings, and that latterly he had been living with another woman.

Duke, K.C. (*Le Bas* with him), for the wife, in the course of his cross-examination of the petitioner was proceeding to put questions as to dates and circumstances under which he suggested that the petitioner had committed adultery, when objection was taken on behalf of the petitioner that these questions were inadmissible, inasmuch as this was a proceeding instituted in consequence of adultery, and the petitioner had not in his evidence denied adultery, and was not, therefore, liable to be asked or bound to answer any questions tending to shew that he had been guilty of adultery.

Barnard, K.C. (*W. O. Willis* with him), for the co-respondent.

SIR GORELL BARNES, PRESIDENT, upheld the objection, but said,—This case is really at an end on the petitioner's own admissions. After the admissions there is no question for the jury. The petition must be dismissed with costs.

Solicitor for the petitioner: *C. T. Wilkinson.*

Solicitors for the wife and co-respondent: *Nicholson, Graham & Beesley.*

H. D. G.

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(1) [1893] P. 292.

(2) (1887) 12 P. D. 196.

1906
May 14.

THE JASSY.

Admiralty—Jurisdiction—Action of Damage by Collision—Foreign Public Vessel — Appearance entered under Misapprehension — Exemption from Arrest.

Process by way of arrest in a damage action in rem does not lie against a vessel the property of a foreign sovereign State and destined to its public use, and, therefore, on the application of the foreign Government, and the production of a certificate from the Foreign Office as to the public character of the vessel in question, all proceedings will be stayed and no waiver of the privilege assumed, although during the temporary presence of the vessel in this country, and under a misapprehension, in order to procure her release, agents of the Government to which the vessel belonged have given an undertaking to put in bail, and have entered an absolute appearance.

The Parlement Belge, (1880) 5 P. D. 197, followed.

Motion to dismiss an action of damage by collision on the ground that the vessel proceeded against was the property of a foreign sovereign State and destined to its public use.

On March 6, 1906, the plaintiffs, the owners of the Greek steamship *Constantinos*, carrying on business at Athens, Greece, issued a writ of summons in an Admiralty action in rem addressed to the owners and parties interested in the steamship *Jassy*, of the port of Braila, claiming "damages arising out of a collision between their steamship *Constantinos* and the defendants' steamship *Jassy* at Sulina on April 30, 1905, which was solely caused by the negligence of the defendants or their servants."

On March 18 the *Jassy* was arrested at Liverpool, but released on an undertaking to put in bail for 1000*l.* given by a firm of Liverpool solicitors acting for the vessel under the instructions of William Johnston & Co., Limited, the Liverpool representatives of the Government of Roumania. On March 22 an appearance was entered on behalf of the owners of the *Jassy* by the London agents of the same Liverpool firm of solicitors.

On April 12 the London agents wrote to the plaintiffs' solicitors informing them that "the *Jassy* is owned by the Roumanian Government," and suggesting that the plaintiffs should withdraw from the further prosecution of the action, but this the plaintiffs declined to do.

On May 5 the Chargé d'Affaires in this country of the Roumanian Government addressed a letter, in the nature of a certificate, to the Secretary of State for Foreign Affairs, setting out the facts as to the arrest of the *Jassy* at Liverpool in respect of the collision in Roumanian territorial waters, and stating that, as the *Jassy* was a public vessel of the State of Roumania and in its possession, and held and worked by the State for the public purposes of the State, including the carriage of mails, passengers, and cargo in connection with the national railways of the State of Roumania—which is the chief and usual employment of the *Jassy*, and which vessel was only accidentally in this country—he ventured to trust that in bringing the matter to the notice of the Secretary of State proper steps would be taken and a termination put to the proceedings against the *Jassy*, and adding that owing to some misapprehension on the part of the local agent of the *Jassy* in Liverpool, and to secure her immediate release, an undertaking to give security on her behalf had been given; but that this was done without the knowledge or authority of the Roumanian Government, and as soon as the facts were brought to the notice of his Government he had been instructed to intervene.

On May 10 a copy of this letter was forwarded by the Secretary of State for Foreign Affairs to the Registrar of the Admiralty Court for the information of the President of the Probate, Divorce, and Admiralty Division.

Aspinall, K.C., and *Lewis Noad*, in support of the motion. It is submitted that all proceedings herein will be stayed, as it has been shewn to the satisfaction of the Court that the steamship *Jassy* is the property of His Majesty the King of Roumania in his sovereign capacity, and that the vessel is employed in the service of the State railways, which are the public property of the State of Roumania.

The case is covered by *The Parlement Belge* (1), where the vessel was very much of the same class, and the Court of Appeal held that there was no jurisdiction to arrest her: see also the principle as to the immunity from arrest in the case of foreign

(1) 5 P. D. 197.

ships, the public property of foreign States and destined to the public use, explained in *The Constitution*. (1) In the case of *Young* v. *ss. Scotia* (2) the privilege from arrest was held to extend to a ferry-boat, as being the property of the Crown, although used for trading purposes as part of the plant of a railway company.

[They were stopped by the Court.]

D. Stephens, contra. The recognized mode of objecting to the jurisdiction is by appearance under protest. The presumption is that by an unconditional appearance the privilege now claimed is intentionally waived. It was quite competent for the Roumanian Government to take that course, and their recognized agents did so, with the result that a submission to the jurisdiction of the Court is involved. The preliminary act and the statement of claim were settled before any notice was received that objection to the jurisdiction would be taken, and the plaintiffs are entitled to proceed in the ordinary way, as they had no knowledge that the vessel was owned by the State railway or that the State railway was owned by the King of Roumania. The case is distinguishable from *The Parlement Belge* (3), as there no appearance was entered. So in *Mighell* v. *Sultan of Johore* (4) there was no appearance.

Aspinall, K.C., in reply. The *Jassy* being temporarily in Liverpool, the appearance was entered under a misapprehension and without the knowledge or sanction of the Roumanian Government, which never had any intention of waiving its privilege.

SIR GORELL BARNES, PRESIDENT. It appears that the vessel in question in this case is the property of the State of Roumania, and from a letter forwarded by the representative in this country of the Roumanian Government to the British Minister for Foreign Affairs it seems that she is employed for the public purposes of the State in connection with the national railways in Roumania. The statements contained in that letter are satisfactorily verified by a communication from the Foreign Office to the registrar, and in that way the facts have been brought to the notice of the Court. The result is that the principle laid down in *The Parlement Belge* (1) applies, in spite of the undertaking to put in bail and appearance entered by some agent in Liverpool without the knowledge of the Roumanian Government and under a misapprehension as to the privilege enjoyed by a sovereign State in respect of the immunity of its public vessels from arrest. The action will be dismissed with costs.

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(1) (1879) 4 P. D. 39.

(2) [1903] A. C. 501.

(3) 5 P. D. 197.

(4) [1894] 1 Q. B. 149.

Solicitors for plaintiffs, the owners of the *Constantinos*: *Holman, Birdwood & Co.*

Solicitors for the agents of the Roumanian Government: *Thomas Cooper & Co., for Hill, Dickinson, Dickinson & Co., Liverpool.*

T. L. M.

C. A.
1906
May 22.

[IN THE COURT OF APPEAL.]

THE RACINE.

Admiralty—Collision—Practice—Total Loss—Measure of Damage—Vessel under three successive Charters—Prospective Profits.

The measure of damage in the case of a vessel totally lost by collision at a time when she is proceeding from a home port with cargo under charter to a foreign port, thence to proceed under charter to another port, and home under charter from that port, is her value at the date when she would have accomplished the homeward voyage, together with such a sum as will represent the profit which would have been realized under the three successive charters, less a reasonable percentage for contingencies.

The Kate, [1899] P. 165, approved.

Appeal by defendants, the owners of the *Racine*, against a decision of Sir Gorell Barnes, President, in favour of the plaintiffs, the owners of the *Secunda*, and the representatives, according to the law of Holland, of her master and crew, on a question of the measure of damage in respect of the total loss of their vessel by collision whilst under three successive charters.

On April 22, 1905, the Dutch iron three-masted schooner

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(1) 5 P. D. 197.

Secunda, of 170 tons net register, and seven hands, belonging to the plaintiffs, the Maatschappy Zeilschip *Secunda*, left Cardiff on practically a round voyage of about three months, viz., with a cargo of 302 tons coals, under a charterparty, dated March 2, 1905, for Cadiz, to proceed thence under another charter-party, dated February 21, 1905, with a cargo of salt to St. Johns, Newfoundland, and thence under another charterparty of the same date, with oil, back to the United Kingdom.

On the same day that she left Cardiff, the *Secunda* was run into and sunk in the Bristol Channel by the steamship *Racine*, owned by the defendants, who admitted liability subject to a reference to the registrar assisted by merchants, and on the terms of paying 80 per cent. of the assessed damages.

On March 28, 1906, the registrar made his report assessing (inter alia) the value of the *Secunda* on the conclusion of her current voyage, that is, on her return to the United Kingdom, at 2400*l*., and the presumed loss of net freight, less 10 per cent. for contingencies, Cardiff to Cadiz, Cadiz to St. Johns, and St. Johns to the United Kingdom, at 300*l*.

On May 7 the defendants, the owners of the *Racine*, moved the Court by way of objection to the report to reduce the amounts allowed by the registrar on the ground that they were excessive, first, because the value of the *Secunda* as at the end of August, 1905, was not the true measure of damage sustained by her owners by reason of the loss, and that there was no evidence what was the value of the vessel at that time; secondly, because the allowance of possible profit the plaintiffs would have made on the three successive charterparties was problematic and too remote, and the arbitrary deduction of 10 per cent. for contingencies shewed the speculative character of the calculation.

Sir Gorell Barnes, President, dismissed the motion with costs, being of opinion that the value of the *Secunda* was rightly assessed by the registrar as at the conclusion of her current voyage, that is, on her return to the United Kingdom; and, secondly, that the question of the allowance of the loss of freight, under the three consecutive charterparties, was practically covered by the principle laid down in *The Kate*. (1)

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(1) [1899] P. 165.

Leave to appeal was refused, but was granted on May 8 by the Court of Appeal on the ex parte application of the defendants.

May 22. *Aspinall, K.C.*, and *Stubbs*, for the appellants (defendants), the owners of the *Racine*. It is submitted that the decision of the Court below was wrong in allowing the value of the *Secunda* as at the presumed date at which she would have arrived in the United Kingdom at the conclusion of the voyages under the three successive charters, and that the prospective freights on the two voyages, viz., Cadiz to Newfoundland, and Newfoundland to the United Kingdom, in addition to the freight for the voyage on which she was engaged at the time of her loss, viz., Cardiff to Cadiz, were improperly allowed, as they were problematic and too remote.

As to the first point, that the value at which the vessel has been assessed is excessive, the evidence is that she cost, in August, 1904, 2666*l.*, and her value in April, 1905, was variously estimated at 2560*l.*, 2300*l.*, and 2125*l.*, or a mean of 2386*l.*, but the sum of 2400*l.* has been allowed as her value in August, 1905, though there is nothing to fix that date, the only evidence of her value being that at the time of her loss.

As to the second point, the rule in Admiralty has been that where the full value of the vessel has been given as compensation, the plaintiff cannot recover anything for the loss of the employment of his vessel in consequence of the collision. In *The Columbus* (1) Dr. Lushington said that he did not recollect any case "where a vessel has been considered as a total loss, and the full value of that vessel having been awarded by the registrar and merchants, any claim has been set up for compensation beyond the value of that vessel"; and that learned judge refused to allow the plaintiff anything in the nature of demurrage for the loss of the employment of his vessel, or his own earnings, that is to say, the damage recoverable by the owner was the value of the vessel and no more. In *The Clyde* (2) the same learned judge held that in the case of a total loss the market value of the ship just prior to the collision was what the owner of it was entitled to. That this is the true rule in the case of a total loss is shewn by

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(1) (1849) 3 W. Rob. 158.

(2) (1856) Swa. 23.

The City of Rome (1), where Lord Hannen approved of this principle and refused to allow a claim for the value of fish which it was alleged would have been caught. The learned judge said that "no distinction could be drawn between that case and the case of a longer venture, such as a sealing or whaling voyage which might be put an end to by a collision," and he considered "the matter concluded by authority, that where there is a total loss the question of the value of the thing lost at that time is what is to be taken into account, without reference to the prospect of what a vessel would have earned if she had gone on a longer or a shorter voyage than the one on which she was engaged at the time."

It may perhaps be assumed from *The Amalia* (2) that Dr. Lushington did not intend to shut out the freight in respect of the cargo on board at the time of the loss, and in *The Kate* (3) the late President held that the proper measure of damage was the value of the vessel at the end of her voyage, plus the profits lost under the charterparty, that is, that the owners of a vessel lost while on a voyage in ballast from London to Miramichi were entitled to an allowance for the estimated profits on a charter from Miramichi to Havre; but that case only covers the profits of the one current charter, and should not be carried to the extent of allowing, as in the present case, the profits on three successive charters, and that case seems to be based on the decision of the House of Lords in *The Argentino* (4), which was a case of the assessment of damages for partial as distinguished from total loss.

In the conflict of judicial opinion which has arisen as to the principle to be applied in respect of prospective profits under such circumstances as the present, it is suggested that the true measure of damage is the value of the *Secunda* at the time of her loss, together with the profits for the immediate voyage on which she was carrying cargo, less an allowance for wear and tear, and that the justice of the case would be met by giving a sum sufficient to replace the vessel, together with the profits she would have earned during the voyage upon which she was

(1) (1887) 8 Asp. M. L. C. 542, n.
(2) (1864) 34 L. J. (Ad.) 21.
(3) [1899] P. 165.
(4) (1889) 14 App. Cas. 519.

actually engaged, viz., to Cadiz, leaving her owners to find another vessel and earn the future profits under the other two charterparties.

[The following cases were referred to: *Reid* v. *Fairbanks* (1); *Straker* v. *Hartland* (2); *The City of Peking* (3); *The Mediana.* (4)]

Scrutton, K.C., and *Balloch*, for the respondents (plaintiffs), were not called upon.

VAUGHAN WILLIAMS L.J. I am not sure that I think the evolution of law through the various decisions which have been cited to us has been quite satisfactory. Speaking for myself, I am not sure that I should have brought myself to adopt the rule that was laid down by Dr. Lushington and Sir James Hannen in the cases of *The Columbus* (5) and *The City of Rome* (6) and other cases to the same effect. At all events, if I had to adopt that rule because I could not think of any better one I should still have been conscious that the application of the rule would not produce perfect justice as between the ship which had caused the collision and the other ship which was damaged. At the same time I say of the later cases, including *The Argentino* (7), that I do not feel at all satisfied myself that the rule of law as now established, which seems to me to render the ship guilty of the collision liable for special damages in the shape of loss of special profits, which are more or less an accident in each case, does do complete justice as between the parties.

It seems to me difficult to be satisfied with a rule which would make the measure of damages, where the wrongful act is absolutely the same in two cases, differ absolutely according to the loss which has been sustained by the person who is injured by the collision—though the wrongful act of the wrongdoer is identical in both cases. Still, the rule seems now to be fully adopted that the injured party is entitled by way of damages to restitutio in integrum, which is to place him in the

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(1) (1853) 13 C. B. 692.

(2) (1864) 34 L. J. (Ch.) 122.

(3) (1890) 15 App. Cas. 438.

(4) [1900] A. C. 113, at p. 119.

(5) 3 W. Rob. 158.

(6) 8 Asp. M. L. C. 542, n.

(7) 14 App. Cas. 519.

Vaughan Williams L.J.

same position as he would have been in but for the collision causing damage—that is to say, not simple damages which will restore to him the ship, but damages which would put him in the same position as to profits to be earned as if the collision had never occurred. I agree that if that rule is adopted as it appears to have been, among other cases, in the comparatively recent case of *The Kate* (1), we cannot do otherwise than follow that rule here as it is there established.

The other observation that I have to make about this case is that I do not at all suppose that the rule had been adopted in the sense that you would give to the injured party restitutio in integrum in respect of profits to be earned without discounting those profits by the possibility of something occurring which would have prevented the earning of the profits. Of course, if you take the case of the profits to be earned upon a particular voyage which is happening at the time of the collision, the discount would practically be very small. It differs in different cases. If the profits are to be earned by arriving at a distant point, say San Francisco, the risk of not being able to earn them would be very small when the vessel arrived within a short distance of her port of destination. Still I understand we are always to discount these future profits by taking the possibility of accidents into consideration; and if you have a chain of charterparties, of course the possibility of earning the profits not being defeated increases with the lapse of time. I have seen here in this case the actual figures upon which the conclusion was arrived at, and it seems to me that these principles, which have now been absolutely adopted, have been properly and very liberally applied, and that ample discounts have been allowed. It is impossible for us to do otherwise than affirm the judgment of the Court below.

STIRLING L.J. I think the authorities point to the conclusion at which the learned President of the Admiralty Division arrived. The law as applied to a case of partial loss was stated by Lord Herschell in the House of Lords in *The Argentino*. (2) He said: "I think that damages which flow directly and naturally, or in the ordinary course of things, from the wrongful act, cannot be regarded as too remote. The loss of the use of a vessel and of the earnings which would ordinarily be derived from its use during the time it is under repair, and therefore not available for trading purposes, is certainly damage which directly and naturally flows from a collision. But, further than this, I agree with the Court below that the damage is not necessarily limited to the money which could have been earned during the time the vessel was actually under repair. It does not appear to me to be out of the ordinary course of things that a steamship, whilst prosecuting her voyage, should have secured employment for another adventure. And if at the time of a collision the damaged vessel had obtained such an engagement for an ordinary maritime adventure, the loss of the fair and ordinary earnings of such a vessel on such an adventure appears to me to be the direct and natural consequence of the collision."

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(1) [1899] P. 165.

(2) 14 App. Cas. 519, at p. 523.

In the present case we have the case of the loss of a vessel which at the time of the loss was subject to three successive charterparties—one to Cadiz, another from Cadiz to Newfoundland, and a third from Newfoundland back to this country. If the law, stated by Lord Herschell, is applicable in the case of a total loss, then it seems to me that the loss of the earnings under those charterparties would have to be taken into account as part of the damages. It is said that the rule does not apply to the case of a total loss; but, although in the early case of *The Columbus* (1), before Dr. Lushington, that learned judge appears to have laid down the law in a way which would seem to lead to the conclusion that such was his opinion, yet in the later case of *The Amalia* (2) he expressly states that where the ship is entirely destroyed the practice has been to take the values of the ship and freight to the ultimate port of destination at the time she would have arrived there, with interest upon those sums. This practice is recognized in the judgment of Lord Esher, the dissenting judge in the Court of Appeal in the case of *The Argentino* (3), where he speaks of the authorities which allowed loss of freight to be earned to be taken into account.

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(1) 3 W. Rob. 158.

(2) 34 L. J. (Ad.) 21.

(3) (1888) 13 P. D. 191, at p. 199.

The sole contention which remained, therefore, here was that although that addition must be made to the damages as regards the loss of freight on the voyage on which the ship was actually engaged at the time of the loss, which was the voyage under the first charterparty, yet the loss of freight under the other two charterparties ought to be treated as too remote. It seems to me that would be sticking to the letter and not following the spirit of the rule laid down by Lord Herschell in the words I have read. The view taken, on this point, by the late President of the Admiralty Division in the case of *The Kate* (1) is, I think, one which we ought to follow.

FLETCHER MOULTON L.J. I am of the same opinion. The case is a little complicated, but it belongs to a class which is of frequent occurrence. The typical case is that of a ship which has been sunk by collision by the tortious act of some person, other than those interested therein, when engaged under charterparty in an adventure. How is the quantum of damages to be ascertained? Everyone agrees that the plaintiff is entitled to be put in the same position pecuniarily as if the collision had not occurred. It is obvious that it is a complicated question to ascertain what is the value of a ship upon the high seas at a particular place having the burden and entitled to the benefit of a partially performed contract of carriage; and, therefore, because the data for ascertaining what the plaintiff must receive to be put in the same position as if the collision had not occurred are so difficult to obtain at that moment, the registrar, according to the practice of the Court, calculated the loss by considering the position of the owner at another date, when the data are more easily obtained. By adopting this plan there is no change in what you are calculating—you are calculating the pecuniary difference made to the plaintiff by the collision—but you calculate it by considering the position of the plaintiff at a date at which you can get the requisite data more easily, and you allow interest from that date only. The date taken is the conclusion of the voyage. Setting aside other risks, the plaintiff, but for the collision, would at the end of the voyage have been in possession of his ship (diminished in value by the wear and tear of that voyage), and would have been in possession of the freight. Neither of these things, however, were certainties. There was the risk of loss during the subsequent part of the voyage, and these two sums must be discounted according to that risk. This is an easy task inasmuch as such risks are the ordinary subject of insurance, and having allowed for these other risks, you get a sum of money the possession of which would be the equivalent of the plaintiff's position had the collision not taken place. The collision has deprived him of that sum, taken as on that date, and accordingly the practice of the Court in fixing the damages has been to calculate that sum and allow interest thereon from the date of the probable arrival at the end of the voyage. It appears to me that this is an accurate method of calculating what ought to be given to the plaintiff to put him in the same position as if the collision had not taken place.

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(1) [1899] P. 165.

The present case differs from the typical and fundamental case with which I have dealt in two respects. In the first place, we have here a chain of voyages. I can see no difference in the principles which should be applied, whether the voyage be one voyage or a chain of voyages under the same charterparty. The more numerous the voyages unperformed at the date of the collision the more numerous the risks that must be allowed for in the calculation, and it does not at all follow that the allowance for these risks will be the same for the later voyages as for the earlier voyages. But the same principle will apply. In the present case there is also the further difference that the chain of voyages is not under one and the same charterparty, but each link of the chain has its separate charterparty. Can that make any difference? I cannot see how it can possibly be held to affect the question, and, therefore, I am of opinion that the method of estimating the damage followed in this case by the registrar is the correct one. I may say I am also satisfied that it is in complete accordance with the authorities.

Appeal dismissed.

Solicitors for appellants (defendants): *Stokes & Stokes.*

Solicitors for respondents (plaintiffs): *Thomas Cooper & Co.*

T. L. M.

1906
June 27.

THE DIAMOND.

Admiralty—Damage to Cargo—" By reason of " Fire—Merchant Shipping Act, 1894 (57 *&* 58 *Vict.* c. 60), *s.* 502, *sub-s.* 1*—Warranty of Seaworthiness.*

Owing to the negligence of the crew in overheating a stove, a fire broke out on board the defendant's ship, and the plaintiffs' cargo was damaged. The plaintiffs alleged that the ship was unseaworthy in that the stove was placed too near to a bulkhead without any means of insulation, and, as the defendant must be taken to be " privy " to the position of the stove, he could not rely upon s. 502, sub-s. 1, of the Merchant Shipping Act, 1894, by which the owner of a British sea-going ship is not liable to make good any loss or damage happening " without his actual fault or privity " to goods damaged " by reason of fire on board the ship." Secondly, the plaintiffs contended that a great part of the damage was due to smoke and to the water used to extinguish the fire, which was not damage included in the statute:—

Held, by Bargrave Deane J., that the defendant could claim the statutory exemption from liability, for the stove was perfectly safe if properly used, and, therefore, the vessel was seaworthy, and the defendant not in fault or " privy " to the negligence of the crew. Secondly, that damage by smoke and by water used in putting out a fire is damage " by reason of " fire within the meaning of the statute.

Action of breach of contract.

The plaintiffs were Spillers & Bakers, Limited, flour merchants, of Cardiff. The defendant was William Robertson, of Glasgow, owner of the *Diamond.*

The case is reported on the question of the statutory exemption from liability in favour of the owner of a British ship in respect of damage to goods " by reason of " fire on board his ship " without his actual fault or privity." (1)

In pursuance of a contract dated February 1, 1905, entered into between the plaintiffs and the defendant, under which the defendant undertook to provide for two years all the steamers that the plaintiffs required for the carriage of their goods, the plaintiffs shipped, under a bill of lading dated December 29 of the same year, on board the steamship *Diamond*, owned by the defendant, a cargo of flour and bran in good order and condition to be conveyed from Cardiff and delivered in the like good order and condition at Belfast.

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(1) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 502: "The owner of a British sea-going ship or any share therein shall not be liable to make good to any extent whatever any loss or damage happening without his actual fault or privity in the following cases, namely:—

"(1.) Where any goods, merchandise, or other things whatsoever taken in or put on board his ship are lost or damaged by reason of fire on board the ship . . . ."

The *Diamond* is an iron screw steamer of 468 tons gross register fitted with engines of 80 horse-power. She was built in 1886 under Lloyd's Special Survey and classed 100 A1, and underwent her last periodical survey, No. 1, in 1903. She left Cardiff on December 30, and on the 31st a fire broke out in the forehold owing to a stove in the firemen's quarters on the starboard side of the forecastle becoming overheated, whereby the adjacent iron bulkhead, three and a half to four inches distant from the back of the stove, became heated, together with a wooden casing to a pipe on the other side, with the result that some of the dunnage and the bags of flour stowed near the casing caught fire. After a hole had been made in the deck and the bulkhead broken through the hose was applied and the fire extinguished, but when the vessel reached Belfast on January 1, 1906, and the cargo was discharged, it was found that 4295 bags of flour and 298 sacks of bran had been damaged by fire and smoke and by water employed to extinguish the fire.

The plaintiffs, by their statement of claim, alleged that "the fire was caused by the negligence of the crew of the *Diamond*" in overheating the stove or allowing it to become overheated. In respect of the position of the stove the plaintiffs alleged that the vessel "was unseaworthy in that the stove was placed too near to the bulkhead and to the wooden casing, and without any air, baffle plate, or other means of insulation to prevent the overheating of the bulkhead, and the ignition of the wooden casing and adjacent cargo."

The defendant admitted the loading of the cargo under the contract, the damage by an outbreak of fire, and that the fire was due to the negligence of the crew in overheating the stove; but, by his defence, denied that the vessel was unseaworthy, and alleged that he was "not liable for the damage by reason of the provisions of s. 502 of the Merchant Shipping Act, 1894," and, further, that he was not liable by reason of the terms of the contract of February 1, 1905, which "incorporated the terms of the miller's produce charter attached thereto. By the said charter it was provided that cargo should be delivered subject to the exceptions of act of God fire and all other accidents or dangers of the seas and navigation even when occasioned by the negligence default or error in judgment of the master mariners or other servants of the shipowners. Further or in the alternative it was a term of the said agreement of February 1, 1905, or by a mutually agreed variation of the said agreement by letters between the parties dated September 28 and 29, 1905, it was a term that the defendant should not be responsible for loss or damage of any kind arising from the neglect default or error in judgment of the master mariners engineers stevedores workmen or other persons employed in or about the ship nor should he be answerable for any loss or damage arising from any latent defect in the ship not resulting from want of due diligence by the owner or by the ship's husband or manager."

J. A. Hamilton, K.C., and *Bailhache*, for the plaintiffs. The Merchant Shipping Act, 1894, was drafted with reference to the settled rules of law, and, therefore, s. 502 will not operate to protect the owner of an unseaworthy ship. In *The Glenfruin* (1) Butt J. says: "I have always understood the result of the cases from *Lyon* v. *Mells* (2) to *Kopitoff* v. *Wilson* (3) to be that under his implied warranty of seaworthiness the shipowner contracts not merely that he will do his best to make the ship reasonably fit, but that she shall really be reasonably fit for the voyage." In *Owners of Cargo on Ship Maori King* v. *Hughes* (4) it was held that the bill of lading contained an implied warranty that the refrigerating machinery was at the time of shipment fit to carry the frozen meat in condition, and the exceptions applied only to what might happen during the voyage, and not to the original fitness of the machinery. So in *Queensland National Bank, Ld.* v. *Peninsular and Oriental*

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(1) (1885) 10 P. D. 103, at p. 108.

(2) (1804) 5 East, 428.

(3) (1876) 1 Q. B. D. 377.

(4) [1895] 2 Q. B. 550.

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Steam Navigation Co. (1) it was held that there was an implied warranty that the bullion room in which the gold was stowed was so constructed as to be reasonably fit to resist thieves. Here the vessel was not reasonably fit to carry the cargo, for the stove was placed in close proximity to an iron bulkhead without any means of insulation. These are modes of equipment for which the owner is responsible, so that he must be held to be "privy" thereto. The owner, therefore, cannot escape liability, as the loss or damage by fire must, according to the Act, be "without his actual fault or privity." It is not material whether the word used is "fault" or "default," and with reference to "default," Bowen L.J. in *In re Young and Harston's Contract* (2) says that it "is a purely relative term just like negligence. It means nothing more, nothing less, than not doing what is reasonable under the circumstances—not doing something which you ought to do, having regard to the relations which you occupy towards the other persons interested in the transaction."

Secondly, the loss and damage due to smoke, and to the water employed to extinguish the fire, are not damage by fire within the meaning of s. 502, and, therefore, the exemption created by the statute will not apply to the greater part of the damage, which was due to the flour and bran being tainted and discoloured by smoke and injured by wetting.

Scrutton, K.C., and *F. D. Mackinnon*, for the defendant. It is not disputed that the vessel was in a fit state as to repairs, equipment, and crew, and in all other respects to encounter the ordinary perils of the voyage, that is to say, the vessel was seaworthy, except, it is alleged, as to this stove, but, as the stove was quite safe if properly used, the vessel was not unseaworthy on that account, the outbreak of fire being the result of negligence on the part of the crew, and not of unseaworthiness of the ship: see *Hedley* v. *Pinkney & Sons Steamship Co.* (3), where there was an opening in the bulwarks of the ship which could be readily closed by fixing a movable railing and stanchions, and it was admitted that if the stanchions and railing had been

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(1) [1898] 1 Q. B. 567.

(2) (1885) 31 Ch. D. 168, at p. 174.

(3) [1894] A. C. 222.

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in their place the ship would have been perfectly seaworthy; but the master negligently omitted to have them put up, and the owner was held not liable though one of the crew fell through the unprotected gap and was drowned.

Secondly, the statutory exemption of liability for fire applies, for there is no evidence on which to base an allegation of actual fault or privity on the part of the owner. Sect. 502 must be construed in the same way as s. 503, where the same words as to "actual fault and privity" occur. Under the latter section it was held in *The Warkworth* (1) that the owner could claim the statutory limitation of liability although the faulty navigation arose from the negligence of a person who had been employed by him on shore in overlooking the machinery. So in *Wahlberg* v. *Young* (2) it was held that the owners of a tug, so improperly navigated as to run the tow aground, were protected by the Act, although that amounted to a breach of the contract to tow.

Thirdly, the loss and damage due to taint and discoloration by smoke, and to wetting from the water used to extinguish the fire, are included in the words "by reason of" which precede the word "fire" in s. 502, sub-s. 1. In *Stanley* v. *Western Insurance Co.* (3) the same kind of question arose on the construction of an exception in a policy of insurance in respect of explosion by gas, and it was held that the exemption of liability for loss by explosion was not limited to cases where the fire was originated by the explosion, but included cases where the explosion occurred in the course of a fire, and that it exempted the defendants in respect both of the damage from the explosion itself and of the damage done by the further fire caused by the explosion.

[Reference was made to *The Satanita* (4) and to *London and South Western Ry. Co.* v. *James*. (5)]

J. A. Hamilton, K.C., in reply. The cases of *The Warkworth* (1) and *Wahlberg* v. *Young* (2) do not turn on seaworthiness, and are, therefore, not relevant to the present issue, which is whether the defendant is not liable for the position of the stove. It must be assumed that it was left where it was with his "privity," and he was bound to guard against the risk of the firemen building up too great a fire.

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(1) (1884) 9 P. D. 145.

(2) (1876) 45 L. J. (C.P.) 783.

(3) (1868) L. R. 3 Ex. 71.

(4) [1897] A. C. 59.

(5) (1872) L. R. 8 Ch. 241.

BARGRAVE DEANE J. This is an action of breach of contract. There is a contract between the plaintiffs and the defendant for the carriage of a cargo consisting of flour in bags and bran; and the contract, as I understand, contains a provision that the shipowner is not to be responsible for loss or damage occasioned by the negligence, default or error in judgment of the master or crew; but I do not think, for present purposes, that that contract is material, because I am going to decide this case, not upon that provision in the contract, but upon the Act of Parliament.

The Merchant Shipping Act, 1894, s. 502, deals with the case of a fire happening on board the ship without the actual fault or privity of the owner. [The learned judge read the section already set out, and continued:—] Undoubtedly this cargo was damaged partly by fire, partly by the smoke resulting from the fire, and partly by the water used to put out the fire, and I hold that the water and smoke were matters which occurred by reason of the fire. That is the only reasonable interpretation of the statute.

Now, the action being brought for breach of contract, the cargo having been damaged by fire, smoke, and water, the defendant's answer is this: "The damage was caused by reason of the negligence of my crew. In the forecastle there was a stove, and that stove was placed three and a half to four inches from the bulkhead which separated the forecastle from the hold in which this cargo was stowed. That stove was overheated. The crew had piled it up with coal to such an extent that it had become red-hot above the fire brick, and that heat communicated itself to the iron bulkhead behind the stove, with the result that the fire occurred. The fault was not my fault, but it was the fault of my crew." This is clearly a case within the statute. The owner is not liable unless he has himself been guilty of some fault, or privy to the matters which caused the damage. First of all there is an implied contract in every case, when a shipowner undertakes to carry a cargo, that his ship shall be seaworthy, or, to use a better word, fit for the duty which he undertakes. In this case the defendant supplied the *Diamond*, and the question which I have to ask myself is this: Was this ship seaworthy, or fit for the carrying of this cargo of flour in bags and bran? Apart from this question of the stove, it is not suggested that she was not. Was, then, this stove in an improper place? Was it too near to the bulkhead, and ought it to have been protected by a baffle plate or some other contrivance for preventing heat from the stove, if it became overheated, being communicated to the bulkhead? On that point I have asked the Elder Brethren, who are assisting me, this question: In their practical experience, was this stove improperly placed at the spot where it was? They have given me the advice that in their opinion if that stove had been properly used there is no reason whatever why it should not have been perfectly safe. The fact that this vessel had made many previous voyages with similar cargoes, while this stove was in the same position, is very strong evidence in support of the view which the Elder Brethren take. My view is clear, assisted as I am by their advice in this matter, that this stove was not so placed as to render the vessel unseaworthy or unfit to carry this cargo. The evidence, to my mind, is all the other way. The question, therefore, is this: Was the owner in fault or privy to this misconduct or carelessness on the part of the crew? There is no evidence that he was. It is suggested it was his fault that the stove was placed in an improper position. I have held that the stove was not placed in an improper position, and therefore that point falls to the ground. For these reasons I think judgment must be entered for the defendant, with costs.

Solicitors for plaintiffs: *Thomas Cooper & Co.*
Solicitors for defendant: *William A. Crump & Son.*

T. L. M.

[IN THE CONSISTORY COURT OF LONDON.]

In re CHRIST CHURCH, EALING.

1906
May 28.

Ecclesiastical Law—Faculty—Church Decorations—Representation of Historical Event set up for the purpose of decoration only—Figure of our Saviour in the Act of Blessing.

The vicar and churchwardens of a parish church applied for a faculty to authorize them to remove the organ of the church from the east end of the north aisle to another position in the church; to separate the end of the north aisle from which the organ was so proposed to be removed by a screen from the rest of the church; to decorate the portion of the church within the proposed screen in conformity with the decoration of the rest of the church, and, with that view, to place at the east end of the north aisle a figure of our Saviour represented as standing and in the act of blessing, the figure to be sculptured in stone in high relief, under life size, about five feet high, and surrounded by a frame in which were to be representations of angels, and the whole to be supported on a single stone pedestal springing from the floor of the church.

The application was not opposed, and a faculty was granted as prayed, the Ordinary being of opinion that the alteration of the position of the organ would be an improvement for the parish, that the rest of the alterations were desirable and advantageous, and that the proposed figure might be lawfully erected as a representation of an historical event set up for the purpose of decoration only.

This was a cause of faculty instituted on behalf of the Rev. Templeton King, the vicar of the parish church of Christ Church, Ealing, in the county of Middlesex and diocese of London, and Miles B. Weston and A. C. T. Challoner, churchwardens of the same church, for the purpose of obtaining a faculty to authorize the petitioners to make the following alterations and improvements in the church, under the superintendence and in accordance with the designs of G. F. Bodley, Esq., R.A.:—

(*a*) To remove the existing organ from the north chapel; (*b*) to decorate the said north chapel, and to furnish the same; (*c*) to erect a screen or grille between the said north chapel and the north aisle; (*d*) to erect a new organ in the gallery at the west end of the church; (*e*) if found necessary, to provide and erect a small choir organ at the east end of the church.

May 28, 1906. The suit was now heard before the Chancellor of the Diocese of London (Dr. Tristram, K.C.).

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CHRIST CHURCH, EALING, *In re.*

The vicar, the two churchwardens, and Mr. Bodley gave evidence orally in support of the petition. From their evidence it appeared that at a meeting of the vestry of the parish of Christ Church, Ealing, a resolution had been passed to accept the offer of a parishioner to defray the cost of making the alterations and improvements proposed in the petition, and to apply for the faculty prayed for; that by the proposed alteration of the position of the organ about thirty seats would be added to the number of seats available for the congregation in the church; that tracings of the proposed scheme of decoration for the north chapel and of the organ front in the west gallery had been filed in the registry; and that, in accordance with this scheme, it was proposed that the north chapel, or portion of the end of the north aisle from which it was intended to remove the organ, should be decorated in conformity with the rest of the church, and with that view a figure of our Saviour, represented as standing and in the act of blessing, should be placed there, such figure to be sculptured in stone in high relief, under life size, about five feet high, and surrounded by a frame in which it was proposed that there should be representations of angels, and the whole ornament or decoration to be supported on a single stone pedestal springing from the floor of the chapel.

It also appeared from the evidence that it was proposed that the ceiling of the chapel should be decorated with paintings in the style of the decoration of the rest of the church, and that it was believed that by the change in the position of the organ the congregational singing would be improved and a better access afforded at the time of the Communion service to the east end of the church.

Ernest Charles, for the petitioners, moved the faculty.

No opponent appeared.

DR. TRISTRAM. This is the first case in which an application has been made to this Court during the time in which I have been Chancellor of the Diocese of London to sanction the erection of such an ornament or decoration as the figure proposed to be placed in the side chapel of this church, and described in the evidence on behalf of the petitioners as "a figure of our Saviour represented in the act of blessing and surrounded by representations of angels," although the Chancellor of the Diocese of Durham appears to have been applied to to authorize the decoration of the reredos of a parish church in that diocese with paintings representing, amongst other figures, a somewhat similar figure to that proposed to be erected in the present case, and refused in his discretion to grant the faculty prayed for, on the ground that the principal figure in that case—a figure intended to represent our Lord seated as King, but forming part of a design described as "meant to convey the idea of the adoration of our Lord in Majesty by the Faithful"—would be liable to be abused by superstitious reverence in the sense explained in *Clifton* v. *Ridsdale* (1), and could not be contended to form a part of a connected representation of any historical subject: *In re St. Lawrence, Pittington.* (2)

In the present case, however, I am of opinion that the figure the erection of which I am asked to sanction falls within the definition of what is lawful as set forth in the decision of the Judicial Committee of the Privy Council in *Phillpotts* v. *Boyd* (3), and followed in *Clifton* v. *Ridsdale.* (4) The figure in question here is practically the representation of an historical event—our Lord in the act of blessing—and appears to have been set up for the purposes of decoration only. A faculty for its erection will therefore be decreed. The faculty to be issued will also authorize the other alterations and works proposed by the petitioners. No question arises as to their legality, and the evidence shews that the alteration of the position of the organ will be an improvement for the parish, and the rest of the alterations desirable and advantageous.

Solicitors for petitioners: *Lee, Bolton & Lee.*

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(1) (1876) 1 P. D. 316, at pp. 352 et seq.

(2) (1880) 5 P. D. 131.

(3) (1875) L. R. 6 P. C. 435, at pp. 466, 467.

(4) 1 P. D. 316, at p. 358.

C. F. J.

[DIVISIONAL COURT.]

1906
May 8

THE NORTHUMBRIA.

Admiralty—Damage to Cargo—Unseaworthiness—Bill of Lading—" All other Conditions as per Charterparty including Negligence Clause"—Incorporation of Exceptions by Reference.

The plaintiffs' goods were carried under a bill of lading containing the words "all other conditions as per charterparty including negligence clause." A clause in the charterparty stated that "the steamer is in no way liable for the consequences of . . . . perils of the seas. . . . . Neither is the steamer answerable for losses occasioned by . . . . unseaworthiness, or latent defect in hull, machinery or appurtenances whether existing or not before or after the commencement of the voyage, not resulting from want of due diligence by the owners of the steamer, or by the ship's husband or manager . . . ."; and, by a further clause in the charterparty, the above clause was to be embodied in the bill of lading.

During the voyage damage was done to the plaintiffs' goods owing to a small crack in a deck plate which let the water through, and the plaintiffs alleged, and established in the Court below, unseaworthiness not covered by the exceptions incorporated in the bill of lading:—

Held, by the Divisional Court (Sir Gorell Barnes, President, and Bargrave Deane J.), reversing the decision of the Court below, that the evidence shewed that bad weather was met with involving straining of the vessel sufficient to account for the crack in question, and, therefore, a prima facie case of perils of the seas had been made out, which the plaintiffs, upon whom the burden of proof rested, had failed to rebut. Secondly, that the bill of lading incorporated by reference the whole of the clause in the charterparty, including the exemption as to unseaworthiness, unless resulting from want of due diligence, of which there was no evidence.

Appeal by defendants, the International Line, Limited, owners of the steamship *Northumbria*, from a decision of the judge of the county court of Kingston-upon-Hull (Admiralty jurisdiction) holding them liable for damage to cargo consigned to the plaintiffs, F. Lenders & Co., merchants of Hull.

The question turned on whether a bill of lading incorporated by reference the whole clause in a charterparty involving exemptions as to perils of the seas as well as qualified unseaworthiness.

The defendants, the owners of the *Northumbria*, entered into a charterparty with Simon Weiler, of Rosario, dated Buenos Ayres, December 5, 1903, of which clause 11 was as follows:—

"The steamer is in no way liable for the consequences of the act of God, perils of the seas and rivers . . . . collisions, strandings and other accidents or errors of navigation, even when occasioned by negligence, default or error in judgment of the pilot, master, mariners or other servants of the shipowners. Neither is the steamer answerable for losses occasioned by . . . . unseaworthiness, or latent defect in hull, machinery or appurtenances whether existing or not before or after the commencement of the voyage, not resulting from want of due diligence by the owners of the steamer, or by the ship's husband or manager . . . ."

Under bills of lading dated December 28 and 29, 1903, Simon Weiler shipped on board the *Northumbria*, then at Rosario and bound to Hull, 5000 bags of linseed weighing 300 tons, "to be delivered in the like good order and condition . . . . the act of God, the King's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation of whatever nature and kind soever excepted, unto order or to their assigns on paying freight for the said goods and all other conditions as per charterparty, including negligence clause."

On arrival at Hull the cargo was found to be damaged in No. 3 hold, and a deck plate over that hold, riveted to the stringer plate on the port side abreast of the forward end of No. 3 hatchway, was found to be cracked.

The plaintiffs, as holders of the bills of lading in respect of the linseed, claimed damages alleged to have been suffered by them in consequence of injury to the linseed through the unseaworthiness of the vessel and the breaches of duty or contract of the defendants or their servants in respect of the carriage of the linseed.

By their defence the defendants (inter alia) alleged that, by the terms of the charter and bill of lading, they were not responsible for damage to cargo occasioned by excepted perils $\frac{\text{and}}{\text{or}}$ negligence, and that "during the voyage heavy seas and the straining and labouring of the vessel strained and depressed a deck beam, and strained and cracked a deck plate, tore the steampipe covers from the deck, damaged the iron chairs and brackets all in the way of No. 3 hold and split the tarpaulins covering No. 3 hatch"; and the defendants, whilst denying liability, paid into court 10*l.* 5*s.* as sufficient to satisfy the plaintiffs' claim. This sum was accepted by the plaintiffs in settlement of a separate claim in respect of damage through absence of dunnage, leaving only the question of the responsibility of the defendants for damage to the cargo through a leak in the deck plate.

On May 22, 1905, the evidence was taken in the county court, and the learned judge, having reserved his decision on the point whether the ship was in a fit condition to make the voyage, subsequently intimated that he would hear further evidence, which was called on December 13. On January 17, 1906, judgment was delivered, in the course of which the learned judge, on the question of seaworthiness, referred to *Hamilton* v. *Pandorf* (1), and said: "The waves encountered by the ship on this voyage were only what might be expected to be met with in a mid-winter North Atlantic gale, and if this ship when fully laden with cargo was not in fact strong enough, I do not see how it can be said that she was seaworthy when laden with that cargo for that voyage. . . . . It is perfectly true that she had passed her survey in 1900, and that there was nothing to lead the owners to suppose that she was not fit, and if I were dealing with a case under the Harter Act, the owners, in my opinion, would be exonerated; but here it is not a question of any neglect on the part of the owners, but a question of a warranty of seaworthiness." The learned judge then referred to the cases of *The Glenfruin* (2); *Lyon* v. *Mells* (3); *Kopitoff* v. *Wilson* (4); *Steel* v. *State Line Steamship Co.* (5); and continued: "If I had to deal with the construction of the charterparty, I have no hesitation in saying that the owners would be exonerated, as they have been guilty of no negligence . . . . but I have to decide whether this condition of qualified seaworthiness is incorporated in the bill of lading, and I am of opinion it is not." The learned judge then referred to *Diederichsen* v. *Farquharson Brothers* (1); *Taylor* v. *Perrin*, referred to in *Serraino* v. *Campbell* (2); *Russell* v. *Niemann* (3); *Manchester Trust* v. *Furness* (4); *Fry* v. *Chartered Mercantile Bank* (5); and continued: "It is true that the bill of lading in this case contains in addition the words 'including negligence clause,' and in the charterparty the sentence relating to negligence (a well-recognized and established form of exception) is contained typographically in a paragraph No. 11, which also has the sentence relating to seaworthiness; but I cannot see that this latter sentence is included in the expression used in the bill of lading. . . . . Therefore, finding as I do, that she was unseaworthy to carry the cargo she had in the ordinary incidents of a North Atlantic mid-winter voyage, I must find the shipowners responsible for the damage sustained by the cargo in consequence of that unseaworthiness." The learned judge in conclusion referred to the case of *McFadden* v. *Blue Star Line*. (6)

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(1) (1887) 12 App. Cas. 518, at p. 522.

(2) (1885) 10 P. D. 103.

(3) (1804) 5 East, 428.

(4) (1876) 1 Q. B. D. 377.

(5) (1877) 3 App. Cas. 72.

Laing, K.C., and *Dawson Miller*, for the appellants (defendants), owners of the *Northumbria*. It is submitted that the learned judge in the Court below was wrong in finding in favour of the plaintiffs both on the question of unseaworthiness and on the question of the qualified exception of unseaworthiness in the charterparty not being incorporated by reference in the bill of lading.

Substantially the defence is that the damage to the plaintiffs' cargo was caused by a leak due to the cracking of a deck plate during the heavy weather encountered on the voyage, that is to say, that the loss arose from sea perils, and that these sea perils are covered by the exceptions in the bill of lading. On the facts the learned judge found for the defendants, and stated that if he had "to deal with the construction of the charterparty" he would have "no hesitation in saying that the owners would be exonerated as they have been guilty of no negligence"; but the learned judge misdirected himself as to the inferences to be

(1) [1898] 1 Q. B. 150.
(2) [1891] 1 Q. B. 283.
(3) (1864) 17 C. B. (N.S.) 163.
(4) [1895] 2 Q. B. 282, 539.
(5) (1866) L. R. 1 C. P. 689.
(6) [1905] 1 K. B. 697.

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drawn from the facts, and was wrong in holding that the warranty of seaworthiness had not been complied with in that the deck plate was not strong enough to resist the strain put upon it. The evidence, particularly the log, shews that the weather was exceptionally heavy and fully sufficient to account for the damage, whilst the interpretation put upon the bill of lading and charterparty is not sound, for the words "including negligence clause" clearly include the sentence relating to seaworthiness in clause 11 of the charterparty, and this view is strengthened by the words in clause 25 of the latter document.

[They were stopped by the Court.]

Aspinall, K.C., and *A. D. Bateson*, for the respondents (plaintiffs). The vessel was not seaworthy, as she was not in such a state of efficiency in hull and equipment as to be able to withstand the perils which were reasonably to be expected on such a voyage, and, if the shipowner wishes to exonerate himself from the consequences of such want of efficiency, he must do it in clear and unambiguous terms, or, in other words, if the carrier desires to relieve himself from the duty of using by himself and his servants reasonable skill and care in the carriage of goods, he must do it in plain language: see *The Pearlmoor* (1), following *Price* v. *Union Lighterage Co.* (2)

It is said that the finding of no negligence is equivalent to relieving the defendants of liability; but if, in fact, as the learned judge in the Court below has found, the damage to the plaintiffs' cargo arose from a defect in the ship, the shipowner will not be protected. In *Dobell & Co.* v. *Steamship Rossmore Co.* (3) the exemption in favour of the shipowner was held not to apply where he had supplied the vessel with proper equipment and appointed a competent ship's carpenter; but by the negligence of the carpenter the ship was allowed to go to sea in an unseaworthy condition, and a part of the cargo was damaged during the voyage. Here the words "other conditions as per charterparty" must be taken to refer to conditions in the charterparty to be performed by the consignee, and the words "including negligence clause" do not, as pointed out by the

(1) [1904] P. 286.

(2) [1904] 1 K. B 412.

(3) [1895] 2 Q. B. 408.

learned judge in the Court below, incorporate the whole of clause 11.

Laing, K.C., in reply. Want of due diligence is equivalent to negligence, but the learned judge in the Court below has expressly found that the defendants have not been guilty of any negligence, and that "it is not a question of any neglect on the part of the owners, but a question of a warranty of seaworthiness," the breach of which has rendered the owners liable under the case of *The Glenfruin* (1), by which he felt himself bound, though in the latter portion of his judgment he suggests a distinction "on the ground that there was there—i.e., in the case of *The Glenfruin* (1)—an original flaw in the shaft, of which there is no evidence in regard to this plate."

SIR GORELL BARNES, PRESIDENT. This is an appeal from the decision of the county court judge at Hull in a case in which the plaintiffs sued the owners of the steamship *Northumbria* for damage which, according to the claim of the plaintiffs, was caused to a cargo of linseed in bags, belonging to the plaintiffs, through the unseaworthiness of the steamship and the breaches of duty or contract of the defendants or their servants. The defendants relied on the terms of the bill of lading, and, substantially, the issue between the parties was whether the plaintiffs' damage was sustained because this ship was unseaworthy, or whether it was sustained in consequence of bad weather, and whether, if sustained through unseaworthiness, the shipowners are responsible having regard to the terms of the bill of lading.

The case seems to have taken a rather curious course, because I find in the record that the plaintiffs called three witnesses—one a marine surveyor, another a consulting engineer, and the third a surveyor—and the case presented by them was that this damage was done owing to a small crack in a plate near No. 3 hatch, which let the water through; and that that plate was so corroded as to be in an absolutely defective condition. The defendants called the master, the mate, and the boatswain of the *Northumbria*, two marine surveyors, and the repairer of this particular damage, also a boiler maker, and the marine superintendent, a formal witness. At the close of the case the learned judge seems to have felt so much doubt that, on the application of the solicitor for the defendants, he gave leave to both sides to call further evidence.

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(1) 10 P. D. 103.

It is important to recollect, in considering a case of this kind, that if a prima facie case of perils of the seas is made out, and the plaintiffs allege unseaworthiness, it is upon the plaintiffs that the burden of proving unseaworthiness rests.

The case appears to have been adjourned for nearly six months, after which the plaintiffs called a marine surveyor who had not seen the ship, and the defendants put in a formal letter from the secretary of Lloyd's Register, and called a naval architect, who was a draughtsman to the builders of the ship, also Lloyd's surveyor, at Cardiff, who had had a good deal to do with her. After that evidence had been given the learned judge delivered his judgment, and this is the commencement of it: "I have already stated that on the question of fact as to what the condition of the cracked plate was, I believe the evidence called by the defendants, and do not believe that of the plaintiffs' experts. It is extremely discreditable that on a question of fact of this sort there should be such a conflict of testimony. Half-a-dozen persons of position, and on whose evidence the Court ought to be able to rely, and who all saw the plate, say, as to two at least of them, that it was corroded away to the thinness almost of a sheet of paper, 1-32nd of an inch. Whilst others say it was not corroded away at all, and though in the ordinary course of things it had wasted slightly, the ship having been built in 1888, and the plates, therefore, having had the wear and tear of some sixteen years, there was nothing abnormal in this and nothing to attract attention or to call for repair or alteration. I accept this view substantially on account of the nature of the repairs ordered and carried out at the time."

It appears, therefore, that so far as credibility of the witnesses is concerned, the learned judge has held that he relies upon the defendants' evidence and not upon that of the plaintiffs. That is extremely important, when the plaintiffs' case is that it was a corroded plate—a rotten old plate—whilst the defendants' witnesses say that this plate was not a defective plate, but was broken by the twisting and straining of the ship in the heavy sea-way.

The learned judge has, I think, been led into an erroneous view of the question of fact that had to be determined, because he proceeds to say that this plate broke and that the weather was not sufficient to account for it breaking, and that, therefore, the ship must have been unseaworthy.

I cannot see my way to agree with the conclusion of fact to which the learned judge has come, because I think that he has not sufficiently appreciated the evidence as to the weather, which is beyond all question true, and is in accordance with the log, which we have had put before us; and that he has omitted to notice the extreme severity of the weather described in that log, causing the ship to lie to on several occasions. I think that, broadly speaking, having regard to what is proved in the case, the evidence is really overwhelming that this ship met with exceedingly severe weather, and that the damage was done in consequence; and that the surveyors who said so were speaking the truth. As regards what they actually said he has believed them, though he does not think, I suppose, they came to a right conclusion. That being the state of things with regard to the facts, I come to the conclusion that the ordinary warranty of seaworthiness—which is that a ship shall be reasonably fit for the purpose of performing the voyage for which she has got the cargo—has been complied with.

Now, as to the construction of the documents. The plaintiffs are suing as holders of a bill of lading under which the goods were originally shipped by Mr. Simon Weiler, and freight was to be paid for the goods, "all other conditions" to be "as per charterparty, including negligence clause, dated Buenos Ayres, December 5, 1903." The charterparty so dated is a charterparty made between the owners of the *Northumbria* and Mr. Simon Weiler, and it contains in clause 11, which has the marginal note "exceptions," numerous perils which are excepted, and proceeds to deal with other exceptions, such as "losses occasioned by explosion, bursting of boilers, breaking of shafts, unseaworthiness or latent defect in hull, machinery or appurtenances, whether existing or not before or after the commencement of the voyage, not resulting from want of due diligence by the owners of the steamer, or by the ship's husband or manager." Clause 25 of the charterparty requires that the exceptions in clause 11, which is the one I have just referred to, should be incorporated in the bill of lading, and I think there is not the smallest doubt that Mr. Weiler, when he put the bill of lading forward in the printed form, containing reference to this negligence clause, intended to comply with the terms of the charterparty. I am afraid I cannot appreciate the argument of counsel for the plaintiffs on this part of the case. It seems to me that any reasonable person, reading this bill of lading and having notice of the charterparty, because it is expressly referred to, would undoubtedly infer, and would be right in inferring, that the whole of clause 11 was included, and that, that being so, unseaworthiness is a matter for which the shipowner is not responsible, unless it results from want of due diligence by the owners of the steamer or the ship's husband or manager. It is not necessary here to consider whether those words include anybody for whom the shipowner is responsible. Whether it does or does not, the learned judge thought there was no evidence of negligence on the part of the owners, and it seems to me that there is no such evidence of negligence. On the point of fact and the point of law I am of opinion that this judgment should be reversed.

BARGRAVE DEANE J. concurred.

Appeal allowed with costs here and below, including attendance here of defendants' solicitor who acted as advocate in the Court below.

Solicitors for appellants (defendants): *Hearfields & Lambert, Hull.*

Solicitors for respondents (plaintiffs): *A. M. Jackson & Co., Hull.*

T. L. M.

[DIVISIONAL COURT.]

1906
July 3, 17.

THE CARLISLE.

Admiralty—Practice—Appeal—Shipping Casualty—Loss of Life—Suspension of Certificate—" Wrongful act or default"—Dealing with Certificate—Conduct of Case by Board of Trade—Costs of Appeal—Merchant Shipping Act, 1894 (57 *&* 58 *Vict. c.* 60), *ss.* 470, *sub-s.* 1 (*a*); *ss.* 474, 475—*Shipping Casualties Rules*, 1895, *rr.* 11, 12, 13, 20 (*i*).

At the conclusion of the evidence in a formal investigation into the circumstances attending the loss of a British ship whereby loss of life ensued, the Board of Trade desired the opinion of the Court on (inter alia) the question whether the loss of the vessel and the loss of life was caused by the wrongful act or default of the master; but the Board declined to say whether the certificate of the master should be dealt with. The Court found that the loss of life was conduced to by the wrongful acts and default of the master, and suspended his certificate for twelve months. A Divisional Court, sitting in Admiralty by way of appeal, came to the conclusion that the certificate ought to be returned to the master as the evidence did not sufficiently establish that the loss of life was caused by his wrongful act or default, and the Divisional Court, under the discretionary powers conferred upon it by the Shipping Casualties Rules, 1895, r. 20 (*i*), ordered the Board of Trade to pay the costs of his successful appeal, on the ground that the Board should have assisted the Court below by intimating whether in their opinion on the evidence the certificate should be dealt with.

Appeal by F. Simpson, late master of the steamship *Carlisle*, against the suspension of his certificate by a court holding a formal investigation into a shipping casualty under s. 470, sub-s. 1 (*a*), of the Merchant Shipping Act, 1894. (1)

The case is reported on the question of the principle upon which the judicial discretion of the Court of Appeal should be exercised in respect of the costs of a certificated officer successfully appealing.

The facts were shortly as follows: The *Carlisle*, a British iron screw steamship of 2157 tons gross register, owned by the

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(1) 57 & 58 Vict. c. 60, s. 470: "(1.) The certificate of a master . . . . may be . . . . suspended—
"(*a*) By a Court holding a formal investigation into a shipping casualty under this part of this Act . . . . if the Court find that . . . . loss of life has been caused by his wrongful act or default . . . ."

Simpson Steamship Company, Limited, with twenty-two hands, and the appellant as master, left Cardiff with a cargo of coal on April 22, 1904, bound nominally for Kiao-Chau, but actually for Vladivostock, at which port she arrived on July 19 after a good deal of trouble with her machinery and boilers. She then ran several voyages between Vladivostock and Saghalien, during which time the engines continued to give trouble, but repairs were effected by Russian Government engineers, and on November 7 she started under a new Russian Government charter for Port Arthur, then in a state of siege and closely blockaded by the Japanese. Her cargo consisted of about 1500 tons of munitions of war (black and nitro-cellulose powder, shells and cartridges), and about 500 tons of foodstuffs (rice, flour, wheat, fish, meat, and butter). On November 18 all four blades of the propeller broke off. The vessel then drifted about, but, with the aid of sails made from bags obtained from the cargo, she finally reached San Miguel Bay, in the Philippine islands, early in February, 1905, where the services of a steamer were obtained, and the *Carlisle* was towed to Manilla on February 26. Here repairs were effected, and the cargo, which had been partly discharged, reshipped. Port Arthur having in the meantime capitulated, Saigon was substituted by arrangement with the Russian Government through the Russian supercargo on board. On April 24 the *Carlisle* left Manilla under her own steam with thirty-one hands, arriving at the mouth of the Saigon river on May 6, and ten days later proceeded some forty miles higher up the river to Ngabé, about eight miles below Saigon, where she remained until the beginning of June, when she went to a place about two miles above Saigon, and, as the consignees, the Russian Government, did not take delivery of the cargo, she remained there throughout the whole of the summer. On May 12 the master took up his residence at an hotel at Saigon, paying occasional visits to the ship.

On December 7 and 11 explosions occurred in No. 4 hold, but they were got under, and the vessel was taken back to Ngabé, and afterwards further down the river.

On December 12 the master came on board and gave orders for all hands to leave the vessel, and the next day, at the request of the master, through the Russian Government, a French Government officer arrived with his men and commenced to examine the cargo. Damaged foodstuffs were sent ashore, and explosives considered uncertain were thrown overboard. On December 17 the expert made a written report to the British Consul that it was safe for the crew to return to the vessel, and, under the orders of the master, the officers returned on the 19th and the rest of the crew on the 21st.

On January 3, 1906, an explosion occurred in No. 3 hold. Some of the crew got away in boats, some jumped overboard and were picked up, but the second engineer and a seaman were not seen again. On the following morning the master and officers examined the vessel, and finding it impossible to save her, the officers and crew were, on February 7, sent home.

The Board of Trade ordered a formal investigation into the circumstances attending the loss of the British steamship *Carlisle*, of London, in the Saigon river, French Cochin China, on January 4, 1906, whereby loss of life ensued. On May 8, and four subsequent days, the inquiry was held at the Town Hall, Cardiff, before a stipendiary magistrate, assisted by three nautical assessors, at which the Board of Trade, the registered owner and master, the chief and second officers, twelve and two of the crew respectively, were separately represented.

At the conclusion of the evidence, counsel for the Board of Trade submitted the following questions upon which the opinion of the Court was desired:—

(1.) What was the nature and description of the cargo shipped at Vladivostock in or about October, 1904? Were the crew aware of the contents of the holds when the vessel sailed, and the port to which she was bound?

(2.) After the vessel arrived in Saigon river, on or about May 6, 1905, were all necessary and proper precautions taken for the safety of the ship and her crew?

(3.) What was the cause of the fires and explosions which occurred on board the vessel on or about December 7 and 11, 1905, and January 3, 1906?

(3a.) Were the ship's log-books saved, and if not under what circumstances were they lost?

(4.) What was the cause of the loss of life?

(5.) Was the loss of the steamship *Carlisle*, and the loss of life, caused by the wrongful act or default of the master?

On these questions being submitted, the solicitor who appeared for the registered owner and master inquired, "Are the Board of Trade asking that the master's certificate shall be dealt with?" to which counsel for the Board of Trade answered, "The Board of Trade do not ask for anything of the sort. They ask the Court to answer the questions and make such recommendations as it thinks fit." The stipendiary then said, "If the Board do not ask the Court to deal with the certificate, I take it the Court will not deal with it. If you do ask that it be dealt with, the Court will consider whether they shall deal with it. What do the rules say?" Counsel for the Board of Trade then quoted from the rules to show that it was not necessary for the Board of Trade to ask the Court to deal with an officer's certificate.

The report of the stipendiary magistrate, concurred in by the three assessors, and dated May 14, found "that the loss of the vessel was due to fire and explosion caused, it is conjectured, by spontaneous combustion in the cargo," and that "The loss of life was due primarily to the fire and explosion, proximately probably to drowning, and was conduced to by the wrongful acts and default of the master, whose certificate is suspended for twelve months."

The reasons stated in the annex to the report gave details in answer to the first question as to the cargo, and the want of information by the crew as to its nature and the destination of the vessel.

In answer to the second question the Court found that, until December 7, 1905, "no necessary and proper precaution for (the vessel's) safety, and that of her crew, appears to have been omitted," and after the explosion on that date "the engagement of the expert was a necessary and proper precaution for the safety of the ship . . . . but the Court is of opinion that for the safety of the crew—having regard to the great quantity, about 1400 tons of munitions of war, some powerfully explosive and others liable to spontaneous combustion as well as explosion

—it was necessary, and was the bounden duty of the master to have ordered the crew ashore, and to have kept on board only a watchman."

The answer then dealt with the explosion on December 11 and the arrival of the expert on the following day, and with reference to the report, made on December 17, by the expert to the British Consul to the effect that there was nothing to fear from the cargo, and that it was safe for the crew to return to the ship, the answer continued: "The master states that he then ordered the crew to return on board. The crew, some of them with great reluctance and under threat of being logged as deserters, returned to the vessel about December 19 and remained on board until January 3, 1906, when the third explosion occurred"; and further stated that "the Court is of opinion that, for the safety of the vessel, it was the master's obvious duty to have discharged his cargo into lighters or to have landed it," that the master knew that only a partial examination of the cargo had been made by the expert, and that "the crew should have been kept ashore in a place of safety until the whole of the cargo had been overhauled and examined or until it had been landed or discharged into lighters."

In answer to the third question, the Court found that "the fires were possibly caused by spontaneous combustion in smokeless powder of inferior quality—combustion possibly due to the action resulting from prolonged exposure to sea air and high temperature and possibly conduced to by the foodstuffs that were stowed in close proximity."

In answer to question (3a.) the Court stated that the ship's log-books were lost, but that the official log-book was taken away by the master from the ship, and the master stated that he was unable to find it.

With reference to the loss of life—question (4.)—the Court "conjectured that they, (the second engineer and the seaman) jumped overboard when the explosion and fire occurred, and were drawn under by the swift current and drowned."

With reference to question (5.) the Court did not feel justified in confidently pronouncing the opinion that the omissions by the master to ensure the safety of his vessel caused or conduced to the loss of the vessel; but with regard to the loss of life the Court held that "the master's neglect to berth the crew ashore after the explosion of December 7 was a grave default, and his acts in ordering the crew back to the vessel and permitting them to remain on the vessel after the explosion on December 11 before the examination of the cargo was completed, were wrongful acts to which the loss of life is due."

On July 3, 1906, the appeal of the master under s. 475, sub-s. 3 (*a*), of the Merchant Shipping Act, 1894 (1), came before a Divisional Court sitting in Admiralty, assisted by two of the Elder Brethren of the Trinity House, when it was contended, on behalf of the master, that the suspension of his certificate was contrary to law, as the evidence given at the investigation did not shew that the alleged loss of life, in respect of which his certificate was suspended, was caused by his wrongful act or default.

The Court (Sir Gorell Barnes, President, and Bargrave Deane J.) referred to the provisions of s. 464 of the Merchant Shipping Act, 1894, as to when a shipping casualty shall be deemed to occur; to s. 466, giving the Board of Trade power to direct that a formal investigation be held with two assessors to assist the Court if the question of suspension of an officer's certificate is involved; to s. 470, as to the power of suspension if one at least of the assessors concurs, and to the requirement that the Court shall state in open court the decision to which they have come with respect to the suspension, and send the suspended certificate to the Board of Trade with their report; to s. 475, providing for a rehearing, or, if that has been refused, for an appeal. The judgment of the President then continued:— So that what we are concerned with here is an appeal from a decision given with respect to the suspension of the certificate of this master, and that is what our inquiry seems to me to be confined to. Now the report in this case is as follows: [The learned judge read the finding of the Court already set out, and continued :—] At the concluson of the annex the Court states the following: "The omission of the master of the steamship *Carlisle* to discharge his cargo into lighters or land it, as above mentioned, was a neglect of duty which, if not omitted, might possibly have preserved the vessel from loss. Such omission (if a culpable omission conducing to the loss) was a default, but if not culpable was a mere error of judgment. The master exercised his judgment and took some measure, viz., the engagement of an expert to overhaul the cargo—a measure he appears to have considered sufficient; but, in the opinion of the Court, he should have taken other measures, and have taken them with promptitude after the explosion of December 7. He should also have given some personal attention to the overhauling by the expert and to precautions against fire. The Court is of opinion that the measures omitted were culpable omissions, but does not feel justified in confidently pronouncing the opinion that the omissions caused or conduced to the loss of the vessel. With regard to the loss of life the position is entirely different. As already stated, and for the reasons stated, the master did not exercise the diligence, care for, and attention to the safety of his crew that duty demanded. The master's neglect to berth the crew ashore after the explosion of December 7 was a grave default, and his acts in ordering the crew back to the vessel and permitting them to remain on the vessel after the explosion on December 11, before the examination of the cargo was completed, were wrongful acts, to which the loss of life is due."

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(1) 57 & 58 Vict. c. 60, s. 475: "(3.) Where on any such investigation or inquiry, a decision has been given with respect to the . . . . suspension of the certificate of a master . . . . and an application for a re-hearing under this section has not been made or has been refused, an appeal shall lie from the decision to the following Courts; namely—

"(*a*) If the decision is given in England . . . . to the High Court."

Now, the appeal before us is with regard to that last paragraph, and the finding that the loss of life was, to use the expression of the Court, "conduced to by the wrongful acts and default of the master." I take it they must have meant "caused by," because otherwise they would not have brought this within the section which justified the suspension. The question, then, on this appeal is whether that last finding is correct or not? I have referred to the Act, because I think that we are not at liberty to enter upon a general inquiry as to all that is in this report, and the various matters and questions which were there gone into, except so far as they bear, or the evidence given with respect to them bears, whether directly or indirectly, upon the question upon which alone an appeal to this Court lies. Therefore it is material, before dealing very shortly with the facts, to see what were the questions which were submitted for the decision of the Court by counsel representing the Board of Trade. [The learned judge read the questions already set out, and continued:—] We are not concerned here with a general inquiry into all the questions which may be asked in a case of this kind, because the appeal is confined to the question whether or not the certificate of the master has been properly suspended. We were invited, it seems to me, by counsel on behalf of the master, rather to travel outside the consideration of that question because it was said that in the course of the annex to the report the learned magistrate had gone into the question of the seaworthiness of this vessel when she left Vladivostock, and had referred in part of his report to her not being then in a seaworthy condition. As far as I can see, no question was submitted by the Board of Trade to the magistrate which rendered it necessary for him to express an opinion on that point, and at the same time I think, for reasons that I have already indicated, it is only material for us to consider it in considering how much weight is entitled to be given to findings which are under consideration by the Court. Beyond that I do not think we are at liberty to go.

The short facts which it seems necessary to refer to appear to be these: [The learned judge then dealt with the facts already set out, and with reference to the examination of the cargo by the French expert, said:—] The substance of it seems to me to come to this, that the captain, having heard of these two explosions, had asked for an expert to examine the cargo, and that expert had made an examination which, it is true, was only partial, but which had been sufficient to satisfy him that he was justified in reporting to the consul that in his own opinion the men might safely go on board the ship; and that when the captain told them they were to go on board some of them went and saw the Consul, and were told by him that it was safe. Unfortunately that did not prove to be the case, because on January 3 an explosion occurred, which ended in the vessel sinking. All the crew got away except two, who were unfortunately found missing, one being the second engineer and the other a seaman. As suggested by counsel on behalf of the master, there may be a doubt as to the fate of those men, but I think it is a reasonable presumption that they lost their lives owing to the disaster.

The question we have to determine is whether that loss of life was caused by the wrongful acts or default of the master. I do not wish to decide this case upon the question of doubt whether these men were drowned or not in consequence of the explosion—I think there is very little doubt about it—but I want to put the case upon the question whether the evidence is such as to satisfy a tribunal that the master was guilty of wrongful acts or default. He is not responsible in this case for mere error of judgment—there must be something more than that—and I cannot bring myself to hold on such evidence as has been given that this master acted wrongfully—in this case it must be almost wilfully. He has a report from an expert. It may be the expert was mistaken—it may be he was right so far as he could see; but at any rate the report of the expert was that it was safe for the crew to go back, and if the captain acted honestly upon that report—and, looking at the evidence, I do not see any suggestion that he acted dishonestly or knowingly exposed the crew to danger—I do not think it is reasonable to hold upon such evidence that a case of wrongful acts or default is established. It may be that it was not wise to rely too much upon what he was told, and it would have been better to have kept the men off the ship, but to my mind this finding is not supported by the evidence, and it is the only finding which affects the master.

I do not intend to travel into the inquiry which counsel on behalf of the master asked me to embark upon, in all its width. Anything that is legitimately connected with the finding will have its weight, but beyond that I do not think we are at liberty to go. The conclusion to which the Court has come, and in which the Elder Brethren concur, is that the master's certificate has not been properly suspended, and ought to be returned to him. The question of costs will be reserved.

The question of costs came up for argument on—

July 17. *J. A. Hamilton, K.C.*, *Lauriston Batten, K.C.*, and *Alex. D. Bateson*, for the appellant, the late master of the *Carlisle.*

John Mansfield, for the Board of Trade.

[The arguments of counsel sufficiently appear from the judgments. In addition to the cases there mentioned the following were referred to on the question of costs: *The China* (1) and *The Grimsby* (2), both cases of rehearing; *The Largo Bay*. (3)]

Sir Gorell Barnes, President. In this case there was an inquiry into the loss of the *Carlisle*, and the loss of life in connection with the loss of the ship, and the result was that the certificate of the master was suspended for twelve months. An appeal was afterwards lodged by the master from the decision of the magistrate, and that appeal was recently heard before this Court, and this Court, having regard to the evidence, came to the conclusion that the certificate ought to be restored to the master; that is to say, that the evidence did not sufficiently establish, after careful examination, that the loss of life—which was the point on which the magistrate had proceeded—was "caused by the wrongful act or default of the master."

Then there arose a question of the costs of the appeal, and it was thought by the Court desirable that the cases should be looked into and the older rules examined, with a view to ascertaining the real position. It is not necessary to go so far back as the rules issued in 1876, because rules were issued in 1878, and of these rules No. 16 is material for present purposes. It runs as follows: "On the completion of their examination the Board of Trade shall state in open Court upon what questions in reference to the causes of the casualty, and the conduct of any person connected therewith, they desire the opinion of the Court; and if any person whose conduct is in question is a certificated officer, they shall also state in open Court whether, in their opinion, his certificate should be dealt with."

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(1) Feb. 23, 1899, not reported.

(2) June 24, 1898, not reported.

(3) See Wreck Inquiries, by Walter Murton (1884), p. 200.

The practice was in accordance with that rule for some time, and in 1879 a statute was passed which gave a right of appeal to this Court from the decision of a magistrate suspending a certificate. That right of appeal is continued by the Merchant Shipping Act, 1894. Now, there were two cases decided after the passing of the Act of 1879. One is *The Arizona* (1), in which the master's certificate had been suspended, and there was an appeal; and as on appeal it was held, according to the head-note, "that there was no evidence that the damage had been caused by the wrongful act or default of the master, the Court of Appeal reversed the decision and restored to the master his certificate"; and it is added: "The Court below having suspended the certificate on the invitation of the Board of Trade, the Court of Appeal ordered the Board of Trade to pay the costs of the appeal." That case was followed by *The Famenoth* (2), in which the same course was adopted. I have before me the report of the magistrate, and I find that counsel for the Board of Trade said: "The Board of Trade are of opinion that the certificate of the master should be dealt with." In that case also there was an appeal, and costs were allowed on the same grounds as in *The Arizona* (1), namely, that the suspension of the certificate having proceeded upon an expression of opinion that the magistrate should deal with the certificate, the effect was to invite the magistrate to deal with the certificate. Therefore the Court of Appeal held that the master should have the costs of the appeal.

Then there came, after the Act of 1879 and after the Act of 1894, a fresh set of rules, viz., the "general rules for formal investigations into shipping casualties, 1895." Rule 11 is as follows: "When the examination of the witnesses produced by the Board of Trade has been concluded, the Board of Trade shall state in open Court the questions in reference to the casualty, and the conduct of the certificated officers, or other persons connected therewith, upon which the opinion of the Court is desired. In framing the questions for the opinion of the Court the Board of

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(1) (1880) 5 P. D. 123.

(2) (1882) 7 P. D. 207.

Trade may make such modifications in, additions to, or omissions from the questions in the notice of investigation as, having regard to the evidence which has been given, the Board of Trade may think fit." Rule 12 reads thus: "After the questions for the opinion of the Court have been stated, the Court shall proceed to hear the parties to the investigation upon, and determine, the questions so stated. Each party to the investigation shall be entitled to address the Court and produce witnesses, or recall any of the witnesses who have already been examined for further examination, and generally adduce evidence. The parties shall be heard and their witnesses examined, cross-examined, and re-examined in such order as the judge shall direct. The Board of Trade may also produce and examine further witnesses, who may be cross-examined by the parties, and re-examined by the Board of Trade." Perhaps I should read also r. 13, which is as follows: "When the whole of the evidence in relation to the questions for the opinion of the Court has been concluded, any of the parties who desire so to do may address the Court upon the evidence, and the Board of Trade may address the Court in reply upon the whole case."

There is one case that has been referred to since these rules were issued. That is the case of *The Throstlegarth* (1), where there was a successful appeal from the suspension of the certificate, and this Court, being asked to deal with the costs, thought it was not a case in which the costs should be given against the Board of Trade—that they had acted with fairness both in the Court below and in the Court of Appeal, and, that having done so, in that case costs should not be given against them. That is the case principally relied upon by the Board of Trade. In that case there was no investigation or consideration of the principle which might apply to affect this question—it was apparently a decision upon the particular facts, and there is a very short decision upon the point, in accordance with the view entertained by the Court at that time.

This matter has now been fully threshed out, and it seems to me that the question requires a determination which will be of some assistance in these cases for the future. The Court of

(1) May 9, 1899, not reported.

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Appeal—that is, this Court—has a general discretion which is expressed in r. 20 of the Rules of 1895, sub-s. (*i*): "The Court of Appeal shall have power to make such order as to the whole or any part of the costs of and occasioned by the appeal as the Court may think just." We have to say upon what lines that discretion should be exercised, without in any way fettering the Court in any particular case, because the discretion is general—but the lines on which we may proceed to consider the exercise of that discretion seem to me of some importance.

There is no question whatever of the fairness and propriety of the conduct of this case by the Board of Trade. In former days I had a great deal of experience of the conduct of Board of Trade inquiries, and as I was always opposed to the department I think I am pretty well able to judge of their fairness and propriety. The question is what is the position to be adopted by the Board of Trade at the conclusion of the evidence. Formerly there was no difficulty, because the Board of Trade were obliged to state in open court whether in their opinion the certificate of the officer should be dealt with. In the present case what took place illustrates the position pretty plainly. At the close of the evidence this is what occurred: [The learned judge referred to the discussion already set out between the solicitor representing the master, counsel on behalf of the Board of Trade, and the magistrate with reference to dealing with the certificate, and continued:] Now one of the questions put was this: "Was the loss of the *Carlisle* and the loss of life caused by the wrongful act or default of the master?" The position taken up by the Board of Trade is that they ought not to be condemned in costs where the case is left as counsel for the Board of Trade left it, and that it is for the magistrate to determine whether he will find certain facts which justify him in dealing with the certificate, whether he will deal with the certificate, and whether he will inflict such and such a sentence. The position taken up by that suggestion appears to me to be an incorrect position, because we must look at the course a case of this kind takes. A certain accident happens. It is an accident of such a nature that it is desirable an investigation should take place. The Board of Trade decides there shall be that

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investigation. The whole of the evidence connected with the matter is then placed before the Court in the usual way. An inquiry is being held. At the outset it is not certain at all what will be the course of the inquiry—what questions will arise and how the matter will be dealt with—and it is not until the close that anybody can be certain exactly what position ought to be adopted.

As soon as the inquiry is closed the questions are put. Those questions may directly involve the liability of the master or other officer to have his certificate suspended, and it is almost a natural course of things that from that moment the master or officer is placed in the position of a defendant who is being charged with an offence which may lead, if found against him, to the suspension of his certificate. So, if the matter is left as in this case it was left, the magistrate is in effect being asked to deal with the certificate if he finds that the facts justify him in so doing. It is natural, then, that the magistrate, if he find those facts, should proceed to deal with the certificate and inflict the penalty which he thinks is justifiable. I cannot help feeling that that is not a satisfactory position. Allowing in every way for the fairness and propriety with which these inquiries are conducted, the Board of Trade represents the public in this matter. It has a duty also to those who are concerned—the master, the owners, and others—which it is desirable properly to discharge. Then we have to ask ourselves what position is the Board of Trade in, through its counsel, at the time the inquiry is closed. If at that time it is clear, reasonably clear, that there is not a case made for suspension of the certificate I cannot help feeling that the Board of Trade is at liberty to say so. If, on the other hand, the case is a strong one, showing gross negligence and impropriety of conduct on the part of the master, leading to a loss caused—to use the words of the section—" by his wrongful act or default," I think the Board of Trade is quite justified in the discharge of its duties in saying to the magistrate it is a case of that character, and the certificate should be dealt with. It seems to me logically to follow that at the close of the inquiry the Board of Trade has to determine upon the line of conduct it will pursue: and if it simply leaves the matter to the magistrate, instead of giving the magistrate its views on the matter, it leaves the magistrate entirely at large, and without, it seems to me, the full assistance that can be given to him. It seems to me desirable in the interest of all concerned that the Board of Trade should have the power I have indicated, and that it should be exercised. I am not in the least afraid that it will be exercised in any way adverse to the person in charge of the vessel beyond what the evidence justifies, because I can perfectly rely upon the fairness with which any charge would be preferred.

Returning now to this particular case, it seems to me that the effect of the course the inquiry took was to leave the magistrate to deal with the certificate, and it was dealt with. That being so, an appeal was brought, and successfully brought, and it would be a very great hardship upon the master—a man, probably, not possessed of much means—if he were to have to fight his appeal and win it and have his certificate returned to him, without being able to obtain from the Board of Trade the necessary expenses to which he has been put. Therefore I think this case cannot for practical purposes be distinguished from the older cases, where there is an invitation to the magistrate to suspend the certificate, and that invitation is acted upon and ultimately overruled. It is further said in this case that our discretion should not be exercised in favour of the master, because there were other circumstances in the case which disentitle him to the exercise of that discretion in his favour. I do not think there are any grounds for acceding to that view, and it seems to me to have been conclusively shewn that the discretion of the Court should be exercised in his favour, and, therefore, the master will have such costs as have been incurred by him.

Bargrave Deane J. I am of the same opinion. I think that the Board of Trade are wrong in their view that they ought to be neutral. I think the Act of Parliament means that they shall not be neutral, but shall give valuable assistance to the Court. I think that instead of being neutral they should assist both sides if the evidence justifies it. Had that been done in this case I think that probably the learned magistrate would not have found

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as he did, and would not have imposed a very heavy penalty upon the master. I think that the Board of Trade, by the Merchant Shipping Act, is especially asked to take this particular line, because there are provisions in the Act which enable them, notwithstanding that the master's certificate has been suspended, to overrule that suspension if they think right, or, if they think there has been a miscarriage of justice, under another section they can order a re-hearing, so that justice may be done. I think that it is clear that the Board of Trade are not in the position of a prosecutor, not in the position of a neutral, but are in the position of a body having special opportunities of knowing what is right and what is wrong, whose duty it is to assist the Court, after the evidence, in coming to a right conclusion. That is a matter in which I think in this particular case they have gone wrong; and I think this decision will assist the Board of Trade, and help to prevent possible miscarriages of justice in the future.

Appeal allowed with costs.

Solicitors for the Master of the *Carlisle: William A. Crump & Son, for Vachell & Co., Cardiff.*

Solicitor for the Board of Trade: *E. Ellis Cunliffe.*

T. L. M.

THE KATE.

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July 26, 27, 30.

Admiralty—Collision—Damage—Contract of Indemnity—Third Party Notice.

A steamship was brought from the entrance of a dock to her berth by two tugs, and was made fast; but was unable to haul on her winches, so as to get completely into position alongside the quay, owing to a barge, attached to a buoy, being in the way. The dock-master sent two men from the two tugs to loosen the barge's headfast, and directed a third tug to tow the barge away; but, in so doing, the barge was negligently allowed to come into contact with the propeller of the steamship, and sustained such damage that the barge sank with her cargo.

In an action of damage by collision brought by the barge owners against the dock owners, the dock owners admitted liability, but brought in the steamship owners as third parties liable to indemnify them under a towage contract made between the dock owners and a firm of ship repairers who had undertaken to bring the vessel from their yard to her berth at their risk. By the towage contract the dock owners were to supply tugs to assist in transporting the steamship within the dock on condition that the masters and crews of the tugs should cease to be under the dock owners' control in connection with the towage, and become subject to the orders and control of the master or person in charge of the vessel and be the servants of the owners thereof:—

Held, by Bargrave Deane J., that the steamship owners were not liable, as third parties, to indemnify the dock owners, as the contract to supply the two tugs was made with the ship repairers, and not with the steamship owners; but, whether that were so or not, the contract for the supply of the two tugs was at an end, and, therefore, the two men from the two tugs, directed by the dock-master to loosen the headfast, had resumed their position as servants of the dock owners, and the action of the third tug under the direction of the dock-master was independent of the transporting contract which applied only to the two tugs.

Action of damage by collision.

The plaintiffs were Bellamy's Wharf, Limited, bailees for hire of the iron dumb barge *Kate*, and owners of the cargo of valonia laden therein.

The defendants were the London and India Docks Company, the owners of the Royal Albert Dock, and owners of the steam-tugs *Rattler*, *Beatrice*, and *Louise*.

The third parties were the Tyser Line, Limited, owners of the steamship *Marere*.

The case raised the question whether, under the terms of a towage contract, the third parties were bound to indemnify the defendant dock company in respect of the dock company's liability for the damage sustained by the plaintiffs through the sinking of their barge with her cargo.

On April 5, 1906, R. & H. Green, Limited, contracted with the Tyser Line, Limited, owners of the *Marere*, to transport that vessel from her discharging berth in the Victoria Dock to their dry dock, and back to her loading berth in the Albert Dock, the vessel during transporting, whilst in dry dock, and until moored at her berth to be at their risk. As the London and India Docks Company do not allow any tugs other than their own to tow any vessel in their docks, the marine superintendent of the Tyser Line on April 30 signed (as the Court found), on behalf of R. & H. Green, a towage ticket addressed to the superintendent of the London and India Docks Company for the supply of tugs to assist in transporting the *Marere* from the entrance of the dock to her loading berth. The terms, including the conditions on the back, of this ticket are set out in full in the judgment, the effect being that the masters and crews of the tugs whilst so employed were to cease to be under the dock company's control, and were to become subject to the orders and control of the master or person in charge of the vessel towed, and to be the servants of the owners thereof, with a consequent liability on those employing the masters and crews of the tugs to pay for any damage, and to indemnify the dock company against any claims.

In pursuance of this contract, and on the same day, the dock company supplied the tugs *Beatrice* and *Louise*, and, under circumstances which are fully detailed in the judgment, the *Marere* was brought to her loading berth in the Royal Albert Dock basin and made fast; but before both tugs had actually cast off a difficulty arose owing to some barges, attached to a buoy in the dock, being in the way, and so preventing those in charge of the *Marere* from hauling on the winches aft and by bringing the vessel a few feet astern get her completely into position. The dock-master seeing this ordered two men from the two tugs to loosen the headfasts, and directed a third tug, the *Rattler*, to tow the barges away; but this operation was so negligently performed that one of the barges, the *Kate*, fell against the starboard propeller of the *Marere*, and sustained such damage that she sank with her cargo.

On May 10 the plaintiffs, Bellamy's Wharf, Limited, as owners of the *Kate* and of her cargo, issued a writ against the defendants, the London and India Docks Company, claiming damages for the loss, and by their statement of claim alleged that the *Kate* was lying safely and securely moored by her chain headfast to a buoy in the basin of the dock, belonging to or under the control of the defendants, when the defendants and their servants improperly slacked out the headfast, and so negligently navigated their steamtug that in moving certain barges the headfast was fouled and the *Kate* brought into contact with the propeller.

The defendants, the London and India Docks Company, put in a defence, but subsequently admitted liability to the plaintiffs, and under a third party notice, dated May 24, addressed to the Tyser Line, Limited, they alleged that they were entitled to be indemnified by the third parties on the ground that, by the terms of the contract under which the defendants, the London and India Docks Company, supplied tugs for the transport of the steamship *Marere*, the Tyser Line, Limited, agreed to indemnify the London and India Docks Company against all liability in respect of their supplying to them such tugs for the transport which was being performed when the alleged collision took place, and, by their statement of claim, the defendants asked for a declaration that they were entitled to be indemnified, for judgment for any amount that might be found due from the defendants to the plaintiffs, and for any costs that they might be adjudged to pay the plaintiffs.

By their defence the third parties denied that they requested the defendants to supply tugs to assist in transporting the *Marere*, and denied that they undertook to indemnify the defendants as alleged or at all, and they (inter alia) alleged "that the damage to the *Kate* and her cargo were occasioned by the defendants' servants acting under the orders of their dock-master whilst engaged in performing the defendants' obligation to the third parties to provide the steamship *Marere* with the berth which had been allotted to her and for which they received reward from the third parties and was in no way connected with the transporting or assisting of the vessel by the two tugs."

The issue between the defendants and the third parties was tried by Bargrave Deane J., assisted by two of the Elder Brethren of the Trinity House, on—

July 26 and 27. *J. A. Hamilton, K.C.*, and *George Wallace*, for the defendants, the London and India Docks Company. The terms and conditions of the towage contract apply, and, therefore, the third parties are responsible to the defendants in respect of the liability of the defendants to the plaintiffs for the damage sustained by the barge *Kate* during the transport of the *Marere* to her berth. The defendants had no notice of the contract between R. & H. Green and the third parties. The towage ticket is signed by the marine superintendent of the third parties, and, according to the evidence, it is the usual practice to employ the defendants' tugs in transporting the ships of the third parties in the defendants' dock upon the condition as to liability to indemnify, which is, and always has been, well known to the third parties. In *The Millwall* (1) the Court of Appeal upheld a contract of indemnity of this nature.

Laing, K.C., and *Dawson Miller*, for the third parties, the Tyser Line, Limited. At the material time the *Marere* was not being transported. She had come to a standstill, and had her ropes out both to the buoy and to the quay. She was waiting to be hauled a few feet astern to be completely in her berth. If, however, the *Marere* was technically being transported, the control of the vessel was entirely in the hands of R. & H. Green, Limited. The transporting pilot was in their employ, and, though H. Barnes was the marine superintendent of the Tyser Line, he signed as the agent of R. & H. Green, who, as contractors, had all the responsibility in connection with the transporting. Paragraph 4 of the statement of claim of the defendants against the third parties runs: "By a towage ticket dated April 30, 1906, and signed by one Barnes"; and then, as amended, the following words are struck out, "the representative of R. & H. Green, Limited," shewing that the defendants were aware of the contract between the third parties and the ship repairers.

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(1) [1905] P. 155.

[*Wallace*, for the defendants. The words struck out by way of amendment cannot be looked at as the amended pleading is the only one upon the record: *Hales* v. *Pomfret.* (1)]

Secondly, the engagement of the tugs was for the purpose of transporting the vessel, and any act done by a servant of the defendant dock company beyond the acts of the tugs in following the orders and directions of the person in charge of the vessel would be outside and beyond the scope of the contract. The tugs supplied under the towage ticket were the *Beatrice* and the *Louise;* but the tug which moved the barges out, and by causing them to strike the headfast of the *Kate* swung her on to the *Marere's* propeller, was the *Rattler* acting under the direct orders of the dock-master, and if some of the crew of the *Louise* slacked down the headfast of the *Kate* they also were acting under the direction of the dock-master. To all these acts the indemnity clause has no application, as they were negligent acts done in the course of the duty of the dock-master to furnish a clear berth for the *Marere.*

[The case of *The Chartered Mercantile Bank of India* v. *Netherlands India Steam Navigation Co.* (2) was referred to.]

Wallace, in reply. The terms of the contract are wide enough to include the negligent acts giving rise to the damage to the *Kate*, even from the point of view taken by the third parties.

[BARGRAVE DEANE J. The tug *Rattler* would not be within the terms of the contract.]

The words are "any servant of the company," and the damage was admittedly caused by a servant of the dock company some twenty minutes before the *Marere* was in her berth, and whilst at least one tug was fast. The negligent act or default of the master of the *Rattler* was "in connection with the towage or transport" of the *Marere.*

Cur. adv. vult.

July 30. BARGRAVE DEANE J. In this case the owners of the barge *Kate* brought an action against the London and India

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(1) (1818) Daniell's Rep. 141.

(2) (1883) 10 Q. B. D. 521.

Docks Company for damages caused by the sinking of their barge in the Albert Dock. The docks company admitted their liability to the owners of the *Kate*, but they brought in as third parties the Tyser Line, Limited, as owners of the steamship *Marere*, being the vessel against whose propeller the barge was brought. By reason of being brought against that propeller the barge was damaged and sank, and the docks company say that under the peculiar circumstances of the case the responsibility rested with the Tyser Line.

There is no question of seamanship in the matter. It is entirely a question as to the interpretation which the Court has to place upon a certain notice printed upon the back of an order given to the London and India Docks Company, the owners of this particular dock, to supply tugs to assist in transporting the *Marere* from the locks to her berth in the Albert Dock. What happened was this. The *Marere*, having come into the docks and unloaded her cargo, was taken out to Messrs. R. & H. Green's yard for the purpose of repairs and placed in dry dock. When the time came that the repairs were completed the vessel had to be brought back to the Albert Dock for the purpose of loading a fresh cargo. She had to be brought in by outside tugs to the entrance of the dock, as the rule is that no tugs shall be employed for the purpose of bringing a vessel into the docks except tugs belonging to the Docks Company. That gave rise to the order I have referred to, to supply tugs for the purpose. Two tugs were supplied, the *Louise* and the *Beatrice*. One was made fast forward and the other aft, and the vessel had to be brought in and moored against No. 4 wharf on the port side as you come in. She was brought in by these two tugs and placed in a position at her wharf, where she had to be brought back some six or eight feet in order to get her accurately into the berth. She could not get accurately into the berth at that time because two barges were lying astern of the place where the *Marere* was lying, filling up part of the space she was to moor in. One of these two barges had to be removed. Now, the evidence is that the *Marere* was moored by the head, and was moored by the stern, with one rope from the starboard quarter off to a buoy in the dock 100 feet away from the quay, and with a steel spring on her port side, which passed through the port quarter and then led forward to a bollard or something on the quay. She was absolutely fast, and in order to get her back six or eight feet as soon as opportunity offered she had only to heave on her winches.

In these circumstances it is sworn that the two tugs which had been supplied by the docks company had been finished with. They had not gone away, but their services were no longer required. At that moment the dock-master proceeded to remove, or take steps for removing, one of these barges astern of the *Marere*. His task was rendered difficult by reason of several other barges being made fast to the buoy which I have mentioned. Those barges seem to have been left without anybody on board, and they were made fast by headfasts to the buoy. It appears from the evidence that those headfasts were so mixed up that it was necessary to break some of them, and to let out the chains in order that the barges might be removed sufficiently far from the buoy to enable the barge against the quay to be towed out. The harbour-master directed the whole of that operation, but having no men there, and finding that the tugs were no longer in use, he ordered a man from each tug to get on to the buoy and deal with those headfasts. The result was this, that the chain attaching the *Kate* to the buoy having been let out a certain distance, the tug *Rattler* was employed to tow out from the quay this barge astern of the *Marere*. As she was towed out she fouled the chain which connected the *Kate* with the buoy, which caused her head to pay off to port and her stern to swing in to starboard, and that brought her against the starboard propeller of the *Marere*, and caused the damage.

Under these circumstances the docks company, as I have said, admitted liability, but say that they are entitled to look to the owners of the *Marere* to meet the claim made against them. The matter is based upon a notice at the back of this order for tugs: "Royal Albert Dock. Please supply tugs to assist in transporting the vessel *Marere* from locks to berth. Such assistance, which includes the removal to and from any intermediate berth or mooring which the vessel may occupy, is subject to the conditions on the back hereof, and is supplied at your published rate for one charge only, payable by R. & H. Green, Limited.

(Signed) H. Barnes. April 30, 1906." The conditions on the back of the notice are as follows:—"Notice is hereby given that tugs ${}^{\text{and}}_{\text{or}}$ transporting men are supplied on the following conditions only. The masters and crews of the tugs and transporting men shall cease to be under the company's control in connection with the towage or transport, and become subject to the orders and control of the master or person in charge of the vessel or craft towed or transported, and are the servants of the owner or owners thereof, who undertake to pay for any damage to any of the company's property or premises, and to indemnify the company (if so required) against any claims for loss of life, or injury to person, or to the vessel or craft towed, or any cargo on board the same, or to any vessel or property of any other person or persons, or to the tug or tugs supplied, whether such damage, loss or injury be occasioned by any actual or supposed act, neglect or default of any of such masters, crew or men, or any servant of the company, or by any defect or insufficiency of the tugs or their machinery or ropes, or by any other cause of any kind in connection with the towage or transport." That is the notice which the docks company say put upon the Tyser Line the responsibility for the damage occasioned to the barge *Kate*. The Tyser line say "this is not damage occasioned within the terms of that notice, but even if it were we have a further defence, namely, that we were not the persons engaged in the towage or transport, but it was the business of Messrs. R. & H. Green, the repairers, who gave this order for the tugs, and who are the persons who should have been sued, if anybody, and not us."

I am of opinion that that last defence is a good one, because the docks company have this order, which on the face of it states that the assistance is to be supplied for one charge only, payable by Messrs. R. & H. Green. That is a distinct notice to them that R. & H. Green are the people to whom they are supplying the tugs, and whom they are recognizing as the persons affected by the notice on the back of the order. I do not think that the fact that Mr. Barnes signed it is sufficient to say that the docks company thought they were dealing with the Tyser Company, to whom Barnes is the marine superintendent. They have distinct notice that the persons to whom they are supplying the tugs are not the Tyser Line, but R. & H. Green.

It is not sufficient, however, for me to rest my decision simply upon saying that the action cannot be brought against the Tyser Line. I think it is necessary that I should state what in my opinion is the proper view to take of the conditions on the back of the order. It is a very complicated order, but I have spent a good deal of time over it, trying to understand really what it means, and it seems to me the whole object of that notice is this: that the persons who are supplied by the docks company to the transporters of a vessel from outside to a berth in the docks are the servants for the time being of the persons so employing them. They are no longer pro hac vice servants of the docks company, but they are pro hac vice the servants of the transporting employers—in this case, as I have said, Messrs. R. & H. Green. For the purpose of argument, however, let us suppose that it was the Tyser Line. They employed two tugs and their crews, and those were the people who, I think, are to be considered, under this notice, as no longer servants of the docks company, but servants of the Tyser Line. This damage, however, is not suggested to have been caused by the tugs or their crews, and the damage was caused, I think, not by the dock-master, but by the carelessness of the men he employed to cast off these barges from the buoy. If the barges had been properly cast off, especially the *Kate*, there would not have been this damage, accruing by the tug swinging the *Kate* up against the starboard propeller of the *Marere*. It seems to me that it cannot be said that when the dock-master, finding the two tugs had finished their work and were lying idle, took a man from each of them, he had any right to do so unless he recognized that they had ceased to be the servants of the transporting company. I think by taking them he shewed that he himself recognized the fact that the contract, so far as the hire of the tugs was concerned, was at an end, and these men had passed back to his own service, and he had a right to claim their service. For this reason I think this notice does not any longer affect the question. The whole question is, Was there any person under this notice in the employment of the transporting company, Messrs. R. & H. Green, or the Tyser Line who had anything whatever to do with this particular damage? I think we must read this notice as I say it ought to be read, and, whatever might be said about the action of the man or men taken from these two tugs, their action was no longer action whilst in the service of the Tyser Line or of R. & H. Green. Their service to the Tyser Line or to R. & H. Green had ceased, and they had become altogether the servants of the docks company alone. For these reasons I do not think the defendants have established a right as against the third parties, and therefore I give judgment for the third parties.

Solicitors for defendants, the London and India Docks Company: *E. F. Turner & Sons.*

Solicitor for third parties, the Tyser Line, Limited: *Charles E. Harvey.*

T. L. M.

1906
July 2.

FAILES *v.* FAILES.

Divorce—Wife's Petition—Desertion—Previous Order of a Court of Summary Jurisdiction—Effect—No Estoppel.

Where a husband leaves his wife under circumstances which clearly point to an intention to desert her, the fact that she subsequently applies to a Court of summary jurisdiction and obtains a separation order there is not a bar to her right to plead such desertion under the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), and, after two years, upon proof of adultery, to obtain against her husband, who has continued to desert her, a decree of divorce.

Smith v. Smith, [1905] P. 249, approved and followed.

Dodd v. *Dodd*, [1906] P. 189, distinguished.

WIFE'S petition for dissolution of marriage on the ground of desertion and adultery.

The parties were married in 1885. Early in 1901 the husband left his wife, but returned after an interval of some weeks. About April, 1901, he again left her, and never returned. In the following month, being destitute, she applied to the magistrate at the South-Western Police Court, and on May 10, 1901, an order was made, upon a finding that the husband, William Christopher Failes, did unlawfully desert the complainant, Ada Harriett Failes, his wife —(*a*) that the applicant be no longer bound to cohabit with her husband; (*b*) that she have the legal custody of the two children of the marriage; (*c*) that he pay to his wife the weekly sum of 10*s.*; and (*d*) costs. The order for maintenance was not complied with, and in 1903 the husband was arrested and committed to prison for three months in default.

Afterwards information was obtained from the police, and on inquiry the respondent was found to have been living in adultery.

Thereupon the petitioner obtained leave to sue in forma pauperis, and this petition was filed.

No answer was put in by the respondent.

W. de B. Herbert, for the petitioner. The only difficulty arises from the President's recent decision in *Dodd* v. *Dodd* (1); but that case is distinguishable. *Smith* v. *Smith* (2), it is submitted, is precisely in point.

Bucknill J. This is a difficult point, but the facts in this case satisfy me that at the time the respondent in the suit left his wife he did so with no intention whatever of resuming cohabitation with her as her husband, and that she, on account of his desertion—not on account of his cruelty—took proceedings under the Summary Jurisdiction (Married Women) Act, 1895, for the purpose of obtaining a sum of money for her maintenance pending his desertion. It is true that in the body of the order there is the statement that she shall no longer be bound to cohabit with her husband; but I have to ask myself whether that statement, appearing as it does in the order, is to bind her here, so as to prevent her from relying upon that which, from the circumstances under which these people separated, I am entitled to assume to be the fact, namely, that this man has not been willing for two years and upwards to live and cohabit with, or to maintain, his wife. I find, as a fact, that he has persistently for the period of over two years, beginning with a time before she took proceedings in the magistrate's court to obtain a sum of money by way of maintenance, deserted her, and has in fact continued to desert her, and would have so continued to desert her if no proceedings had been taken before the magistrate. There is nothing to the contrary in the evidence. Indeed, the evidence tends to support my view, as he was living with another woman for the greater part of the time. The two years ought to be allowed to run and to count for the purpose of allowing the wife to get a divorce in this Court.

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(1) [1906] P. 189.

(2) [1905] P. 249.

It was said by Bargrave Deane J. in the case of *Smith* v. *Smith* (1): "What, then, am I to do with the case of this woman, who has been deserted since 1897?"—he was speaking in 1905. "Here is a man who never approached his wife, but continued to keep away from her and to commit adultery. I am forced to conclude that this decision of the justices is a nullity, so far as it affects the jurisdiction of this Court, and was only intended to operate for her protection at the time when it was made."

In the case of *Dodd* v. *Dodd* (2) the learned President (Sir Gorell Barnes) said "that the order (of the magistrates) does not affect the jurisdiction of this Court"; but he held, nevertheless that in point of fact there could be, in his opinion, no desertion by the husband after the wife had taken steps to obtain an order for maintenance against her husband. I have to consider these two cases. I treat them, of course, with the greatest possible respect. On the facts of the case now before me, I find that the husband left his wife in 1901; that he has continued to stay away from her; and that during this time he has been committing adultery with some woman. I find as a fact that the wife took those proceedings for the purpose of obtaining from her deserting husband maintenance during his continued and prolonged desertion; and I am of opinion that, on the facts of this case, the petitioner is not debarred from proceeding against her husband for a decree nisi on the ground of desertion coupled with adultery. I base my decision principally on the ground that the Act of Parliament was not intended to, and in my view it did not, affect the condition of things in such a case as this, with

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(1) [1905] P. 249, at p. 252.

(2) [1906] P. 189, at p 196.

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regard to the right of a wife to sue subsequently in this Court for a divorce. There cannot be a shadow of doubt in the mind of anybody, I should think, that this woman never thought that, by what she was doing, she was debarring or estopping herself from taking advantage of her husband's continued desertion; and, the two years having expired, she ought to be, and I hold that she is, in this particular case, entitled to act upon it. It would be extremely hard if she were estopped from proceeding merely on the ground that by going to the magistrate she had prevented herself from still alleging desertion; and I say, with the greatest respect to the decision in *Dodd* v. *Dodd* (1) that the wife is entitled to rely on her husband's desertion. To hold the contrary would mean this—that the fact that a man's wife had proceeded against him for an order by the magistrate to maintain her whom he had deserted, would destroy the wife's right to proceed against him for a decree nisi afterwards, and would enable him with impunity to commit adultery with any person or persons as against his wife, and that her hands are to be held tied because of the order of the magistrate. For the reasons I have given shortly I pronounce a decree nisi with costs, and the custody of the children.

Solicitor: *William Ashford.*

H. D. G.

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(1) [1906] P. 189, at p. 196.

1906
July 30.

In the Estate of ROBERT GEORGE DAVIS.

Probate — Practice — Administration with Will annexed — Sole Executrix incapable of acting—Joint Grant to Nominees of Sole Executrix—Court of Probate Act, 1857 (20 *&* 21 *Vict. c.* 77), *s.* 73.

Where a sole executrix and universal legatee was incapable, owing to ill-health, of taking probate, the Court allowed a joint grant of administration, with the will annexed, to be taken by her nominees.

In the Goods of Roberts, (1858) 1 Sw. & Tr. 64, followed.

Motion for a grant of administration, with the will annexed, to nominees of the sole executrix, who was incapable of acting. Robert George Davis died on May 26, 1906. By his will dated November 9, 1885, he appointed his wife, Eugenie Henriette Davis, sole executrix and universal legatee. His gross estate was 3663*l.* 16*s.* 11*d.*, and his debts and liabilities were 6737*l.* 3*s.* 1*d.*

The deceased was manager of a bank, and securities stood either in his sole name or in his name jointly with other persons on account of the bank or its customers to the extent of 700,000*l*. The said Robert George Davis left him surviving, besides the said Eugenie Henriette Davis, his widow and executrix, two children, both minors. His widow, being for reasons of health incapable of attending to any kind of business or of taking probate, had given a written consent, dated July 16, 1906, to a joint grant, with the will annexed, being made to Lewis Henry Benoit Davis, a relation of herself and also of the deceased, along with George Watkins Beste, the successor of deceased as manager of the bank.

R. F. Bayford moved accordingly under s. 73 of the Court of Probate Act. He cited *In the Goods of Sarah Hannah Roberts.* (1) No renunciation by or citation of the widow is necessary, she having consented. A joint grant might be made here. One nominee represents the family of the deceased and the other represents the interests of persons with regard to whom the deceased was in a fiduciary position.

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(1) 1 Sw. & Tr. 64.

BARGRAVE DEANE J. assented to the motion, and, upon the authority of the case cited, made a grant, under s. 73, to the applicants for the use and benefit of the widow.

Solicitors: *Budd, Johnson & Jecks.*

H. D. G.

CLARK *v.* CLARK AND SALDJI.

1906

Aug. 3.

Divorce—Husband's Petition—Separate Estate of Wife (Respondent)—Allowance under Separation Deed—Order for Costs against Respondent.

Upon a decree nisi for divorce, granted upon a husband's petition, the Court made an order for costs against the respondent, whose separate estate consisted of an allowance payable under a separation deed; but, there being no evidence that the respondent was living in adultery at the time of the making of the order, directed that execution should not be enforced beyond one-half of the amount of the allowance.

HUSBAND'S petition for dissolution of marriage, on the ground of adultery.

At the hearing the adultery was proved, and a decree nisi was granted.

W. S. M. Knight (*Smitton* with him), for the petitioner, asked for costs against the wife, whose separate estate was shewn to consist of an allowance of 1*l.* a week payable under a deed of separation during the joint lives of the husband and wife.

W. O. Willis and *D. Cotes-Preedy*, for the respondent. The deed contains no dum casta clause, and can only be varied after decree absolute and upon a petition presented for that purpose. There is no evidence that the respondent is now living in adultery, and our instructions are that she is not. The allowance under the deed is her only means of support. No precedent has been cited in support of an application such as this, upon a similar state of facts.

SIR GORELL BARNES, PRESIDENT, made an order for costs against the respondent, but directed that it should not be enforced beyond one-half of the amount of the allowance payable to her under the deed, thus leaving her, for the present, 10*s.* a week to live upon.

Solicitor for petitioner: *W. C. Broadbridge.*
Solicitors for respondent: *Wainwright & Co.*

H. D. G.

[IN THE CONSISTORY COURT OF LONDON.]

THE PERIVALE FACULTY.

DE ROMANA *v.* ROBERTS.

1906
Aug. 8.

Ecclesiastical Law—Faculty—Reservation by Rector of Grave Space—Confirmatory Faculty authorizing Burial of Non-parishioner in Parish Churchyard—Order on Rector to discontinue Burials of Non-parishioners not dying in the Parish.

With the concurrence of the incumbent of a parish church a non-parishioner petitioned the Ordinary to sanction by a confirmatory faculty the exclusive grant of the reservation for the sole use of herself, her executors, administrators and assigns, of a portion of ground in the parish churchyard as a place of burial. The grant of the faculty was opposed by one of the churchwardens of the parish on the ground that the granting of it would be detrimental to the rights of the parishioners to be buried in the churchyard in preference to non-parishioners. At the hearing of the suit it appeared that the petitioner had paid to the incumbent a considerable extra burial fee for the grant of the reservation according to the custom of the parish; that the population of the parish only amounted to forty-six persons; that on the average the number of burials of parishioners was one per annum, and that there was room for about seventy interments in the churchyard, an addition to which had been consecrated some years back with a view of non-parishioners being buried there.

The Court granted the faculty as prayed, but made an order on the incumbent that he should make no further grants of reservations of grave spaces to non-parishioners during his tenure of the living.

Semble: The incumbent of a parish church may make grants of the reservation of grave spaces to non-parishioners on their paying to him, or in some cases to him and the churchwardens, special burial fees, but to complete their title to the grant of faculty from the Ordinary is necessary.

THIS was a cause of faculty instituted on behalf of Mrs. Emily B. de Româna, of No. 18, York Street, in the county of London, against the rector, churchwardens, parishioners, and inhabitants of Perivale, in the county of Middlesex and diocese of London, for the purpose of obtaining a licence or faculty "confirming a grant made to the petitioner by the Rev. Charles Joseph Hughes, the rector of the rectory and parish church of Perivale, of the reservation to her, her executors, administrators or assigns, of a specified portion of ground in the churchyard of the parish of Perivale, and securing to her, her executors, administrators and assigns in perpetuity, the exclusive use of the same portion of ground as a place of burial."

The petition stated that the petitioner had agreed with the rector of Perivale for the reservation of the above-mentioned piece of ground and had paid to him for the reservation the sum of twenty-two guineas; described the piece of ground the reservation of which was so granted as of the dimensions of seven feet by three feet and situate "near the grave of Richard Dawes near the pathway," and prayed for the grant of a confirmatory faculty in the above terms. The rector signified his consent to the application for the faculty by signing a statement to that effect at the end of the petition.

Separate appearances were entered for Louis Roberts, the people's churchwarden, and for the rector and George Seymour Valentin, the rector's churchwarden.

July 17, 1906. The cause was heard before the Chancellor of the Diocese of London (Dr. Tristram, K.C.).

The rector's churchwarden was examined orally in support of the petition, and the people's churchwarden was called as a witness to give evidence against the grant of the faculty. The result of their evidence, so far as material, is stated in the judgment. It was admitted that the rector had received the amount of twenty-two guineas in respect of the grant of the reservation mentioned in the petition.

Ernest Charles, for the petitioner. The faculty asked for by the petitioner ought to be granted. It will be objected that the petitioner is not a parishioner of Perivale, and that unless the faculty is refused the preferential rights of the parishioners of Perivale to be buried in the parish churchyard will be prejudiced contrary to law. There is no substance in either of these objections. The grant of a faculty of this kind in the case of a non-parishioner is not unusual or unreasonable, and has been approved of in the Court of Arches in the case of *In re Sargent* (1), where the practice of this Court on the point was referred to, and no serious detriment to the burial rights of the parishioners will be occasioned by the reservation to the petitioner of the very small portion of the churchyard mentioned in the petition, having regard to the small number of the parishioners—forty-six in number—and the existing accommodation for interments in the churchyard. The petitioner has paid a special burial fee to the rector in accordance with what has been the practice in the parish of Perivale for very many years—certainly from 1813—in consideration of the reservation of a grave space in the churchyard; and whatever otherwise might have been her rights in respect of this grant made by the rector, she has come to the Court in order to obtain a legal title to this reservation in perpetuity, and whether the amount of the fee paid by the petitioner should be retained wholly by the rector or divided between him and the churchwardens is not a question with which the petitioner has any concern. [The following case was referred to: *Gilbert* v. *Buzzard*. (2)]

The solicitor for the rector and the rector's churchwarden supported the case of the petitioner.

A member of the firm of solicitors for the people's churchwarden opposed the grant of the faculty, on the ground that the rector, in the case of the petitioner and very many other cases, had, by selling grave spaces in Perivale churchyard, worked injustice to the parish, as the population of Perivale must largely increase, having regard to recent improvements in the neighbourhood, and if the practice of burying non-parishioners there was not at once stopped an addition to the churchyard or a burial ground under a burial board would of necessity have to be provided in the near future at the expense of the parishioners, to whose account no share of the special fees received by the rector had ever been allotted. No doubt the incumbent of a parish has by law a certain control over the surface of the parish churchyard; but the interior part belongs to the parishioners for their interment, and if non-parishioners are to be permitted to be buried there the confirmation of the parish by the consent of the vestry or of the churchwardens ought to be obtained, because the parishioners may have to pay rates for increasing the churchyard, and if a faculty for a grave for the burial of non-parishioners is applied for the Court ought not to grant it unless it is satisfied that in granting it it is acting for the benefit of the parish. [He referred to Phillimore's Ecclesiastical Law, 2nd ed., vol. 1, pp. 654, 655; Steer's Parish Law, 6th ed. 162.]

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(1) (1890) 15 P. D. 168.

(2) (1821) 2 Hagg. Cons. 333, 343.

Ernest Charles, in reply. The parishioners will not be really prejudiced in any way by the grant of this faculty, as it is clear from the evidence that an addition to the churchyard of a portion of the glebe was made in 1884, through the instrumentality of the present rector, and without expense to the parish, for the express purpose of the added ground being used for the burial of non-parishioners.

Cur. adv. vult.

Aug. 8, 1906. DR. TRISTRAM, K.C. In this case Mrs. Emily de Romāna, of 18, York Street, London, filed a petition in this Court in May last, in which she stated that she had agreed with the Rev. Charles Joseph Hughes, the rector of Perivale, in the county of Middlesex and diocese of London, for the reservation for the sole use of herself, her administrators, executors or assigns, of a portion of ground in the churchyard of the said parish, the dimensions of such portion of ground being seven feet by three feet, the same being situate near the grave of Richard Dawes, Esq., near the pathway, and that she had paid to the said rector the sum of twenty-two guineas for the said reservation, and she prayed the Court to grant her a faculty confirming the grant of the said portion of ground, and securing to her executors, administrators and assigns in perpetuity the exclusive use of the same as a place of burial. The rector, at the end of the petition, signified his assent in writing to her application.

At the hearing of the petition on July 17 last Mr. Ernest

Charles, as counsel for the petitioner, moved the Court to grant a confirmatory faculty as prayed, stating that he understood that Mr. Roberts, the people's churchwarden, would oppose it, on the grounds of the petitioner being a non-parishioner, and that the granting of it would be detrimental to the rights of the parishioners, who were entitled in preference to non-parishioners to be buried in the churchyard of their parish.

In answer to the first objection Mr. Ernest Charles referred to the case of *In re Sargent* (1), and to the cases there cited, in which Lord Penzance, on an appeal in The Arches, accepted the practice of this Court as an authority for granting a faculty for securing a grave space to a non-parishioner in a churchyard in which members of his family had been interred as parishioners. There is no doubt that for two hundred years and upwards it has been the practice of this Court, with the concurrence of the rector or vicar of a parish, to sanction by faculty the interment of non-parishioners in a churchyard where this can be done without serious risk of depriving parishioners, present or future, of their right of being buried there, subject, however, to the payment of a considerable extra fee, generally to the incumbent, but in some parishes by custom divisible between the incumbent and the churchwardens, the latter expending their portion in keeping the churchyard in order, or as a fund for providing for its future enlargement.

In answer to the second objection Mr. Ernest Charles relied on the evidence of Mr. G. Valentin, the rector's churchwarden, who was an architect, and who deposed that he had made himself acquainted with the history of the parish, and with the circumstances under which the churchyard had been enlarged by Dr. Hughes, the rector, more than twenty years ago. His evidence is as follows: "Dr. Hughes, the present rector, in 1884 made to the original churchyard, which extended over 10,609 square feet, an addition from the rectorial garden of over 6,800 square feet, which was consecrated presumably, having regard to the small population of the parish, for the interment of non-parishioners. The church is a very ancient one, and the population of the parish, which is 530 acres in extent, consists of only forty-six

(1) 15 P. D. 168.

persons, and most of the non-parishioners have been interred in the new portion of the churchyard. At the present time there is sufficient room in the churchyard, principally in the new portion of it, for the burial of seventy persons. During the last five years the average number of burials of non-parishioners has been thirteen per annum, and of parishioners of only one per annum. But from October 1, 1905, to April 14, 1906, fourteen non-parishioners have been interred there, and only one parishioner. During this time the rector has been ill, and the arrangements for the interments have been made by his daughter for him. The fee for the interment of a parishioner in a grave is 10*s.* 6*d.*, for that of a non-parishioner in a grave for two persons twenty guineas, and for four persons forty guineas, payable to the rector. His fees are—for reopening a grave for the interment of a non-parishioner five guineas, and for a tombstone or monument five, ten, or twenty guineas, according to its dimensions. It appears also from The Chronicles of the parish of Greenwood Parva, the ancient name of Perivale, that as far back as 1720 the burial of non-parishioners took place in this churchyard, and by the burial register that from 1813 to 1869 there were no less than eighty-six non-parishioners interred in it, and I remarked, on looking over the list of entries in the register, that most of the recent burials of non-parishioners were from the adjoining parish of Ealing.

The solicitor who appeared for Mr. Roberts, the people's churchwarden, in addition to the objections mentioned by Mr. Ernest Charles, said that his client objected to the rector making money by the sale of graves in the churchyard. This objection is untenable, as from very early times the rectors and vicars of parishes have invariably been entitled to considerable fees from parishioners for vaults in churches and churchyards, and in the City parishes and in many of the large London parishes a very considerable portion of their incomes was formerly derived from these fees.

The question the Court has now to determine is whether in its discretion it should grant the faculty asked for by Mrs. de Romána. This lady has paid to the rector the sum of twenty-two guineas for a grave capable of burying two persons, the usual fee charged by him for such a grave, and she is advised, and rightly so, that she cannot complete her legal title to it unless the rector's grant is confirmed by a faculty from this Court. The question for my consideration is whether I shall do an injustice to the parishioners, present or future, of this very small parish or to future rectors by granting this faculty. There remains now sufficient room in this churchyard, unless the population is increased, for the burial of seventy persons for seventy years to come; and by the order I am about to make, namely, to put a stop to there being any further burials in this churchyard of non-parishioners during Dr. Hughes' tenure of the rectory, the granting of this faculty to Mrs. de Romána will practically work no injustice either to succeeding rectors or to the parishioners.

Should it hereafter be considered desirable for the purpose of increasing the rector's income of 210*l.* per annum and for forming a fund for keeping the church and churchyard in repair, this might be done by making an addition to the present churchyard of a portion of three acres of pasture land belonging to the rectory, and which adjoins the churchyard with no houses near it, provided the bishop would consent to consecrate it partly with this object.

I therefore decree the faculty to issue to Mrs. de Romána as prayed, and make an order on the rector to pay the costs incurred by Mr. Roberts by appearing at the hearing by his solicitor; and I also make an order on the rector that the burial of non-parishioners in the churchyard shall be discontinued.

The solicitor for the people's churchwarden asked the Chancellor whether it was necessary for the grantees of the other grave spaces to apply for their grants to be confirmed by faculty.

DR. TRISTRAM. A confirmatory faculty is by Ecclesiastical Law necessary to confer on them a good title to their grave spaces. Any parishioner might object to the faculty being granted. But under the circumstances of the present case on an application being made in chambers, a confirmatory faculty would be granted to each of the grantees.

Solicitors for petitioner: *Lee, Bolton & Lee.*

Solicitor for rector and rector's churchwarden: *W. W. Woosnam.*

Solicitors for people's churchwarden: *W. A. & G. A. Brown.*

C. F. J.

1906
July 6;
Aug. 2, 3.

THE HOHENZOLLERN.

Admiralty—Salvage—Practice—Reopening Appraisement—Basis of Value.

The principle adopted in *The Harmonides*, [1903] P. 1, in the case of a damage action, is applicable to a salvage action, so that if, in the absence of agreement, or of the acceptance of the affidavit of value filed by the defendants, an appraisement is applied for, the value to her owners in her damaged condition on the completion of the salvage service is the basis on which the appraisement of the salved vessel is to be made, and under ordinary circumstances such an appraisement is conclusive.

ACTION OF SALVAGE.

The plaintiffs were the owners, master, and crew of the *Siam.*

The defendants were the owners of the *Hohenzollern*, her cargo and freight.

The case is reported on the question of the basis on which the value of a salved vessel is to be determined.

On February 25, 1906, the Austrian steamship *Siam*, of 4600 tons gross register, from Barry to Port Said with coal, carrying a crew of thirty-three hands, and of the total value with cargo and freight of 53,550*l.*, was in about lat. 34° 40′ N., and long. 22° 34′ E., when she fell in with the North German Lloyd steamship *Hohenzollern*, of 6668 tons gross register, from Marseilles to Alexandria, with mails, cargo, and ninety-seven passengers. The vessel was disabled, having broken her tail-end shaft, and the *Siam* took her in tow and brought her on February 27 safely into the inner harbour at Suda Bay.

The defendants, as owners of the *Hohenzollern*, her cargo and freight, by their affidavit sworn by G. B. Bryant, a member of the firm of Keller, Wallis & Co., London agents of the North German Lloyd Steamship Company, put the value of the vessel at 25,500*l.*, the cargo, some of which had been damaged by leakage through the stern tube, at 8330*l.*, and freight at risk 370*l.*, making together 34,200*l.*; but the solicitors of the defendants subsequently wrote to the plaintiffs that the value of the cargo was 7400*l.*, as it had been over-estimated by 930*l.*

The plaintiffs, being dissatisfied with these figures, obtained an order for a commission of appraisement. This was executed on July 4 and a return made by the Admiralty marshal certifying that Joseph Lachlan, valuer of shipping, and John Augustus Thompson, consulting engineer (the latter having surveyed the vessel at Genoa on June 26 and 27), had appraised the value of the *Hohenzollern* in her damaged state as lying at Suda Bay on the completion of the salvage service at 51,500*l.*, and the marshal estimated the value of the cargo at 9650*l.*, making a total with freight of 61,520*l.*

The attention of the Court having been drawn to the great disparity between the value of the *Hohenzollern* and of her cargo as assessed by the owners and the value as appraised by the marshal, counsel on behalf of the defendants, after referring to *The Oscar* (1), moved the Court to reopen the appraisement on the ground that the marshal must have omitted to notice matters tending to diminish the value, and that the appraisement was irregular as Mr. Lachlan, the valuer, had not seen the vessel.

Counsel for the plaintiffs opposed the motion, on the ground that it appeared from the certificate of appraisement that the consulting engineer, J. A. Thompson, had seen the vessel, and that was sufficient to satisfy the Court. The appraisement therefore, being an act of the Court by its deputy, ought not to be reopened solely on account of disparity in the figures, for according to the practice it was conclusive: *The R. M. Mills* (2); *The Georg.* (3)

(1) (1829) 2 Hagg. Adm. 257.

(2) (1860) 3 L. T. 513.

(3) [1894] P. 330.

Bargrave Deane J. (who was assisted by two of the Elder Brethren of the Trinity House), on July 6, after hearing the case on the merits, reserved his award, on the ground that the disparity in the figures was so great as to render it difficult to be sure of doing justice between the parties, and, therefore, directed that a new and independent valuation should be made by a valuer to be selected by the registrar, and accordingly Mr. Kellock, of Liverpool, was sent out to Genoa, where the *Hohenzollern* was then undergoing repair. The value so assessed was for the vessel 52,800*l.*, and for the cargo 8303*l.*

Aug. 2. *Aspinall, K.C, Lewis Noad,* and *C. R. Dunlop,* for the plaintiffs, the owners, master, and crew of the *Siam,* supported the appraisement, on the ground that it was confirmed by the valuation now before the Court; that in salvage as in damage actions the correct view to take was that in considering the market value, if that could be obtained, some addition must be made representing the special value of the vessel to her owners.

Laing, K.C., and *D. Stephens*, for the defendants, the owners of the *Hohenzollern*, her cargo and freight, submitted that the great disparity between the valuation of the vessel as given in the affidavit filed by the defendants and that set out in the assessment made by the officer of the Court had led to the idea that there must be some mistake in the figures; but that it was now clear, from the final valuation made by direction of the Court, that there was no mistake, and that the disparity in the figures rested on some difference of principle upon which the assessments were based. The valuation which appeared in the affidavit filed on behalf of the defendants was based on the market value. Apart from exceptional circumstances, that was the true test in a salvage suit: see *The Cleopatra* (1); and, in practice, the market value had been that adopted in the registry down to 1903, when, in consequence of the decision in *The Harmonides* (2), a different practice appeared to have been followed. That was a case of damage by collision, and the evidence went to shew that the vessel which, as the result of the collision, sank, was a profitable vessel to her owners, but that there was practically no market

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(1) (1878) 3 P. D. 145, at p. 150.

(2) [1903] P. 1.

1906

THE HOHENZOLLERN.

value for her, as when she ceased to be worked at a profit as an Atlantic liner she would only fetch breaking-up price. The decision was that in estimating her value at the time of the collision the test, in the absence of a market value, was what the vessel was fairly worth to her owners from a business point of view. In such circumstances, and for the purposes of a damage action, in which the owner of the vessel damaged is entitled to be indemnified, that might be a sound principle to adopt; but in salvage cases the principle of indemnity was not applicable, and the true test of value was what the vessel would fetch in the market in the condition in which she was salved, and in cases where the owners of the salved vessel did not appear the vessel was sold by the Court and the value tested in that way. Any other method of valuation involved a fictitious, not a real, value, as it could not be tested by appraisement in the ordinary way, for it involved considerations of a vague and ambiguous character.

BARGRAVE DEANE J., after consultation with the President and consideration of the case of *The Harmonides* (1), stated that, in ordinary cases, it was not desirable to go behind the appraisement, but that it did not appear in the present case upon what principle the appraisement had been made; and therefore, as it was not advisable to bring the valuers into court and by examination in chief and cross-examination ascertain how they had arrived at their conclusion, he would inquire of Mr. Lachlan as to the principles which had guided him in arriving at the appraised value. On the following day (August 3) the learned judge stated that Mr. Lachlan had informed him that the value of the *Hohenzollern* had been arrived at by regarding her in her damaged condition as a sea-going vessel used by her owners for cargo and general purposes—in other words, following the principle in *The Harmonides* (1), the value had been taken at what she was worth in her damaged state to her owners; and the Court, regarding that as the correct view to be adopted in salvage cases, accepted the appraisement of 51,500*l*. for the value of the vessel.

(1) [1903] P. 1.

1906

THE HOHENZOLLERN.

On that basis as to the value of the salved property the learned judge awarded the owners, master, and crew of the *Siam* the sum of 2700*l*. by way of salvage remuneration for the services rendered to the *Hohenzollern*, her cargo and freight, with costs, including the costs of appraisement of ship and cargo.

Solicitors for plaintiffs (the owners, master, and crew of the *Siam*): *William A. Crump & Son.*

Solicitors for defendants (the owners of the *Hohenzollern*, her cargo and freight): *Clarkson, Greenwell & Co.*

T. L. M.

THE END.

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DISCRETION—Matrimonial Causes Act - **125**
See DIVORCE. 1.

—— Notary public—Striking off roll - - **86**
See ECCLESIASTICAL LAW. 5

DISSOLUTION OF MARRIAGE.
See under DIVORCE.

DIVORCE—*Adulterous Petitioner—Discretion—Matrimonial Causes Act*, 1857 (20 *&* 21 *Vict. c.* 85), *s.* 31—*Duty of Petitioner to place Material Facts before the Court—Refusal of Decree.*

The interests of society and public morality are to be considered by the Court in exercising the discretion conferred by s. 31 of the Matrimonial Causes Act, 1857. EVANS *v.* EVANS AND ELFORD - - - **Gorell Barnes, Pres. 125**

2. —— *Husband's Petition—Separate Estate of Wife* (*Respondent*) — *Allowance under Separation Deed — Order for Costs Against Respondent.*

Upon a decree nisi for divorce, granted upon a husband's petition, the Court made an order for costs against the respondent, whose separate estate consisted of an allowance payable under a separation deed; but, there being no evidence that the respondent was living in adultery at the time of the making of the order, directed that execution should not be enforced beyond one-half of the amount of the allowance. CLARK *v.* CLARK AND SALDJI
Gorell Barnes, Pres. 331

3. —— *Legitimacy Declaration Act*, 1858 (21 *&* 22 *Vict. c.* 93)—*Foreign Domicil—Divorce in another State—Recognition by Law of Domicil—Effect—English Law.*

The Courts of this country will recognize the binding effect of a decree of divorce obtained in a State where the husband was not domiciled, if the Courts of the country or State of his domicil would recognize the validity of the decree.

G., an American citizen temporarily resident and carrying on business in England, but who never abandoned his domicil of origin in the State of New York, married an Englishwoman in England. She afterwards instituted proceedings under the Guardianship of Infants Act, 1886, which were compromised by a deed of separation. Some years later she instituted, in the State of South Dakota, proceedings for a divorce, to which he put in an answer and cross-claim, the latter being dismissed, and a decree being pronounced on the wife's petition, upon a ground which would not constitute a ground for dissolving the marriage either in the Courts of the husband's domicil or in this country.

Upon evidence which satisfied this Court that the Courts of the husband's domicil would recognize a decree so obtained:—

Held, that the South Dakota decree of divorce must be recognized as a valid dissolution of the marriage, and that the subsequent marriages of the respective spouses were consequently valid. ARMITAGE *v.* ATTORNEY-GENERAL (GILLIG CITED). GILLIG *v.* GILLIG
Gorell Barnes, Pres. 153

4. —— *Petition by Wife — Desertion and Adultery—Subsisting Order against Husband under the Summary Jurisdiction* (*Married Women*) *Act*, 1895 (58 *&* 59 *Vict. c.* 39), *s.* 5, *sub-s.* (*a*)—*Effect of Separation Orders under that Act.*

A wife who takes a separation order under the Summary Jurisdiction (Married Women) Act, 1895, within two years from the time when desertion commenced, cannot subsequently, after the expiration of the two years, allege that her husband has deserted her for the space of two years and upwards without reasonable excuse, so as to constitute the offence contemplated by the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85).

So *held* by Sir Gorell Barnes, Pres., disagreeing with *Smith* v. *Smith*, [1905] P. 249. DODD *v.* DODD - - **Gorell Barnes, Pres. 189**

5. —— *Practice — Adultery — Claim for Damages only—Principles and Practice applicable to such a Petition—Matrimonial Causes Act*, 1857 (20 *&* 21 *Vict. c.* 85), *ss.* 31, 33, 59.

A petition by a husband claiming damages only presented under s. 33 of the Matrimonial Causes Act, 1857, is subject to the same provisions as other petitions presented under the same Act.

Where, therefore, a husband presents a petition for damages only and has himself been guilty of a matrimonial offence, which, in the exercise of the discretion vested in the Court, would lead the Court to refuse to grant him a decree in a suit if a dissolution of the marriage were claimed by him, he is, on the like ground, debarred from recovering damages from the adulterer. COX *v.* COX AND WARDE
Gorell Barnes, Pres. 267

6. —— *Settlements, Variation of—Power of Appointment in Favour of Petitioner's Second Wife and Children of Second Marriage — Interest of Child of Dissolved Marriage — Matrimonial Causes Act*, 1859 (22 *&* 23 *Vict. c.* 61), *s.* 5.

The main object and intent of the Legislature in giving the Divorce Court power to vary marriage settlements is to place the parties in the same position, as far as possible, as if the marriage had not been put an end to through the fault of one of them.

Where, upon a marriage which had been dissolved, power had been given to the innocent party, if survivor, by the terms of the marriage settlement, to appoint a portion of the settled fund in favour of a future spouse and the children by any future marriage, the Court, in varying such a settlement, may, although issue of the dissolved marriage survive, permit such power to be exercised in the lifetime of the guilty party, to an extent, having due regard to all the facts, not detrimental to the interests of such issue. HODGSON ROBERTS *v.* HODGSON ROBERTS AND WHITAKER
Gorell Barnes, Pres. 142

7. —— *Wife's Petition—Desertion—Previous Order of a Court of Summary Jurisdiction—Effect—No Estoppel.*

Where a husband leaves his wife under circumstances which clearly point to an intention to desert her, the fact that she subsequently applies to a Court of summary jurisdiction and obtains a separation order there is not a bar to her right to plead such desertion under the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), and, after two years, upon proof of adultery, to obtain against her husband, who has continued to desert her, a decree of divorce.

DIVORCE—*continued.*

Smith v. *Smith*, [1905] P. 249, approved and followed.

Dodd v. *Dodd*, [1906] P. 189, distinguished. FAILES *v.* FAILES - - **Bucknill J. 326**

—— Judgment in rem—Foreign Court—Domicil Jurisdiction—Decree of divorce by New York Court — Validity of divorce in England - - - - - **209**
See INTERNATIONAL LAW.

DOMICIL—Divorce, Decree of, by New York Court—Validity of divorce in England - - - - - - **209**
See INTERNATIONAL LAW.

—— Foreign domicil—Legitimacy Declaration Act—Divorce in another State—Effect —English law - - - - **135**
See DIVORCE. 3.

DREDGER—Demurrage of—Collision—Measure of Damage - - - - - **95**
See SHIPPING. 4.

ECCLESIASTICAL LAW — *Church Discipline Act*, 1840 (3 *&* 4 *Vict. c.* 86), *s.* 13—*Criminal Suit by Letters of Request—Pretended Ordination of Priest by Incumbent of Parish Church, not being a Bishop—Articles* 23, 34, *and* 36 *of Articles of Religion—Officiating in Nonconformist Chapel in Parish of another Incumbent —Disobedience to lawful Commands of Ordinary —Sentence—Discretion—Deprivation — Suspension ab officio et beneficio.*

It is an offence against ecclesiastical law for the incumbent of a parish church, not being a bishop, to purport to ordain a priest without having been given public authority to take upon himself the power of ordination.

The incumbent of a parish church, not being himself a bishop, after public notice and in express disobedience to the commands of the bishop of the diocese, read Evening Prayer, celebrated Holy Communion according to the use of the Church of England, and preached a sermon in a nonconformist chapel in another parish wherein he had no cure of souls, and also then and there purported to ordain a layman as a presbyter of the Church of God, reading portions of the form of ordering of priests according to the Prayer Book, and taking the part of the ordaining bishop :—

Held, in a criminal suit by letters of request brought under the Church Discipline Act, 1840, within two years of the above acts, in which suit the incumbent appeared as defendant and attempted to justify his actions as lawful, but at the close of the case regretted his error and submitted to the judgment of the Court, that the defendant, in so purporting to ordain a priest, was guilty of an offence against ecclesiastical law, punishable in the case of an incorrigible offender by a sentence of deprivation ;

Held, also, that having regard to the defendant having stated at the hearing that he admitted and regretted his error, the Court would not pronounce sentence of deprivation against him, but would decree that the defendant be suspended ab officio et beneficio for two years, admonish him to abstain in future from the like offences, and condemn him in the costs of the proceedings.

The Court treated the undoubted and admitted offences of the defendant in officiating in a nonconformist chapel in the parish of another incumbent and in contumaciously disobeying the lawful commands of his ordinary as merged in, and overshadowed by, the offence of purporting to exercise the power of ordination of a bishop. BISHOP OF ST. ALBANS *v.* FILLINGHAM - - **Arches Ct. of Canterbury 163**

2. —— *Faculty—Church Decorations—Representation of Historical Event set up for the Purpose of Decoration only — Figure of our Saviour in the Act of Blessing.*

The vicar and churchwardens of a parish church applied for a faculty to authorize them to remove the organ of the church from the east end of the north aisle to another position in the church ; to separate the end of the north aisle from which the organ was so proposed to be removed by a screen from the rest of the church ; to decorate the portion of the church within the proposed screen in conformity with the decoration of the rest of the church, and, with that view, to place at the east end of the north aisle a figure of our Savour represented as standing and in the act of blessing, the figure to be sculptured in stone in high relief, under life size, about five feet high, and surrounded by a frame in which were to be representations of angels, and the whole to be supported on a single stone pedestal springing from the floor of the church.

The application was not opposed, and a faculty was granted as prayed, the Ordinary being of opinion that the alteration of the position of the organ would be an improvement for the parish, that the rest of the alterations were desirable and advantageous, and that the proposed figure might be lawfully erected as a representation of an historical event set up for the purpose of decoration only. IN RE CHRIST CHURCH, EALING - **Consist. Ct. of London 289**

3. —— *Faculty—Ornaments of the Church —Liability to abuse by Superstitious Reverence— Stations of the Cross set up, not for Purpose of Decoration only, but to take a Place in Devotions paid to the Deity before them—Sacring Bell— Altar Cards—Crucifixes—Discretion to refuse Confirmatory Faculty where Opinion of Church-going Parishioners adverse to Retention of Ornaments—Decorations—Image of the Good Shepherd —Effect of Consecration on Church Ornaments— Practice—Arches Court Rules, September,* 1903.

A faculty was granted to remove out of a parish church as illegal church ornaments certain pictures known as Stations of the Cross, placed in the church without a faculty having been obtained for their introduction, and set up, not for purposes of decoration only, but intended to take a place and play a part in devotions to be paid to the Deity before them, and having been in fact used as intended.

A confirmatory faculty was also granted for the retention in the same church of a small figure standing on a bracket under a canopy representing our Saviour as the Good Shepherd, the whole figure made of oak and uncoloured,

ECCLESIASTICAL LAW—*continued.*

and affixed about ten feet from the ground to the east wall of the church on the south side of the chancel arch, it being held to be a mere architectural decoration not liable to give occasion to superstitious reverence in any form.

An application for a confirmatory faculty to authorize the retention in a parish church of church ornaments not illegal of themselves, but placed in the church without the authority of a faculty, cannot be regarded in any more favourable light than an application for a faculty for the first introduction into the church of the same church ornaments, and in all such cases the Ordinary will refuse to grant the confirmatory faculty prayed for unless there is before him sufficient evidence of a general desire of the churchgoing parishioners for the retention in the church of the church ornaments in question.

Where, therefore, two isolated crucifixes had been placed over the pulpits in a parish church by the incumbent without the sanction of a faculty, the Ordinary, without deciding either whether the crucifixes were illegal per se or whether on the evidence they were or were not liable to be abused by superstitious reverence, being of opinion that it had been sufficiently proved that no general desire on the part of the churchgoing parishioners existed for the retention in the church of such unusual adjuncts of the pulpits of the churches of the Church of England, refused to grant a confirmatory faculty authorizing their remaining in the church, and decreed a faculty to issue for their removal.

A bishop does not by consecrating or dedicating a church give any episcopal sanction—direct or indirect—for the retention in the church of church ornaments or decorations which may have been in the church at the time of its consecration or dedication.

Practice where an appeal apud acta is asserted in a case to which the rules and regulations of the Arches Court issued September, 1903, are applicable. MARKHAM *v.* ALL AND SINGULAR THE VICAR, CHURCHWARDENS, PARISHIONERS, AND INHABITANTS OF SHIREBROOK - - **Consist. Ct. of Southwell 239**

4. —— *Faculty—Reservation by Rector of Grave Space—Confirmatory Faculty authorizing Burial of Non-parishioner in Parish Churchyard —Order on Rector to discontinue Burials of Non-parishioners not dying in the Parish.*

With the concurrence of the incumbent of a parish church a non-parishioner petitioned the Ordinary to sanction by a confirmatory faculty the exclusive grant of the reservation for the sole use of herself, her executors, administrators and assigns, of a portion of ground in the parish churchyard as a place of burial. The grant of the faculty was opposed by one of the churchwardens of the parish on the ground that the granting of it would be detrimental to the rights of the parishioners to be buried in the churchyard in preference to non-parishioners. At the hearing of the suit it appeared that the petitioner had paid to the incumbent a considerable extra burial fee for the grant of the reservation according to the custom of the parish; that the population of the parish only amounted to forty-six persons; that on the average the number of burials of parishioners was one per annum, and that there was room for about seventy interments in the churchyard, an addition to which had been consecrated some years back with a view of non-parishioners being buried there.

The Court granted the faculty as prayed, but made an order on the incumbent that he should make no further grants of reservation of grave spaces to non-parishioners during his tenure of the living.

Semble: The incumbent of a parish church may make grants of the reservation of grave spaces to non-parishioners on their paying to him, or in some cases to him and the churchwardens, special burial fees, but to complete their title to the grant of faculty from the Ordinary is necessary. DE ROMANA *v.* ROBERTS. THE PERIVALE FACULTY

Consist. Ct. of London 332

5. —— *Notary Public—Inherent Jurisdiction for proper Cause to strike Notary Public off Roll of Notaries—Discretion—Notaries Act,* 1533 (25 *Hen.* 8, *c.* 21), *ss.* 3, 4—*Public Notaries Act,* 1801 (41 *Geo.* 3, *c.* 79), *s.* 10—*Public Notaries Act,* 1833 (3 *&* 4 *Will.* 4, *c.* 70), *s.* 4—*Public Notaries Act,* 1843 (6 *&* 7 *Vict. c.* 90), *s.* 9—*Stamp Act,* 1891 (54 *&* 55 *Vict. c.* 39), *s.* 44.

The Court of Faculties has inherent jurisdiction to strike a notary public off the roll of notaries public, and can exercise this jurisdiction in any proper case where it is not precluded from doing so by statute.

A solicitor of the Supreme Court of Judicature in England, admitted and enrolled a notary public under the Public Notaries Act, 1833, was struck off the roll of solicitors for professional misconduct in relation to property of which he had been appointed administrator. Thereupon, after notice to him as respondent, an application to strike him off the roll of notaries public was made in the Court of Faculties.

The Master of the Faculties being of opinion that the Court of Faculties had inherent jurisdiction to grant the application, ordered that the respondent should be struck off the roll of notaries public. *In re* CHAMPION - **Ct. of Faculties 86**

ESTOPPEL — Divorce — Wife's petition—Desertion — Previous order of a Court of summary jurisdiction — Effect — No estoppel - - - - - - **326**
See DIVORCE. 7.

EXECUTOR—Administration with will annexed —Joint grant to nominees of sole executrix - - - - - **330**
See PROBATE. 2.

FACULTY—Church decorations—Representation of historical event set up for the purpose of decoration only - - **289**
See ECCLESIASTICAL LAW. 2.

—— Ornaments of the Church — Liability to abuse by superstitious reverence - **239**
See ECCLESIASTICAL LAW. 3.

—— Reservation by rector of grave space **332**
See ECCLESIASTICAL LAW. 4.

FIRE—Damage to cargo—"By reason of" fire—Warranty of seaworthiness - - **282**
See SHIPPING. 9.

FOREIGN COURT—Divorce by New York Court, Decree of—Validity of divorce in England - - - - - - - **209**
See INTERNATIONAL LAW.

FOREIGN DOMICIL — Legitimacy Declaration Act—Divorce in another State—Effect—English law - - - - - **135**
See DIVORCE. 3.

FOREIGN PUBLIC VESSEL — Jurisdiction — Appearance entered under misapprehension—Exemption from arrest - **270**
See SHIPPING. 12.

GRANT OF ADMINISTRATION.
See under PROBATE.

HARBOUR—Ship—Damage—Defective berth—Duty of harbour authority - - **48**
See SHIPPING. 11.

HISTORICAL EVENT—Representation of, set up for the purpose of decoration only—Faculty - - - - - - **289**
See ECCLESIASTICAL LAW. 2.

HUSBAND AND WIFE—Divorce.
See under DIVORCE.

INDEMNITY—Shipping—Collision—Damage—Contract of indemnity—Third party notice - - - - - - - **317**
See SHIPPING. 3.

INTERNATIONAL LAW—*Divorce—Judgment in rem—Foreign Court—Domicil—Jurisdiction—American Law—Residence—English Marriage—Decree of Divorce by New York Court—Validity of Divorce in England.*

A divorce granted by a foreign Court, being a judgment affecting the status of the parties, stands on the same footing as a judgment in rem, and therefore cannot be set aside in this country, even on the ground of fraud, by a person who was no party to the proceedings in which the judgment was pronounced.

Castrique v. *Behrens*, (1861) 30 L. J. (Q.B.) 163, approved.

The domicil for the time being of the married pair, when the question of divorce arises, affords the only true test of jurisdiction to dissolve their marriage; and the Court of the bona fide existing domicil has jurisdiction over persons originally domiciled in another country to undo a marriage solemnized in that other country; and such a divorce will be recognized by the English Courts even if granted for a cause which would not have been sufficient to obtain a divorce in England.

Harvey v. *Farnie*, (1882) 8 App. Cas. 43, and *Le Mesurier* v. *Le Mesurier*, [1895] A. C. 517, applied.

The resolution of the judges in *Lolley's Case*, (1812) Russ. & Ry. 237, must be treated as confined to the particular facts of the case in which it was given.

In 1880 a marriage was celebrated in England between two English persons. In 1886 the husband commenced divorce proceedings against the wife for adultery with B., which failed upon proof of the husband's cruelty, and in 1889 he sailed for New York, where he lived in adultery with another woman and acquired a domicil in the State of New York. The wife and B. continued to live in adultery, and in 1890 the wife went to New York for the purpose of obtaining a divorce, and subsequently obtained a decree from the New York Court for dissolution of her marriage on the ground of her husband's adultery. There was no collusion between the husband and wife, but her matrimonial misconduct in England was not disclosed to the New York Court. In 1893 the wife went through a ceremony of marriage with B. in New York, which, assuming they were then at liberty to marry, was a valid ceremony. In 1903 B. presented a petition for a declaration of nullity of the New York marriage:—

Held, that, both according to the law of the State of New York and of England, the New York Court had jurisdiction to decree a divorce, as the husband had acquired a domicil in New York, the adultery complained of by the wife was committed in that State, and the wife had elected to make the domicil of the husband her own for the purpose of the divorce proceedings, and had acquired a "residence" there according to the law of New York, and consequently that the petition must be dismissed.

Decision of the President (Sir Gorell Barnes), affirmed. BATER *v.* BATER - - **C. A. 209**

JUDGMENT—In rem—Foreign Court—Divorce by New York Court, Decree of—Validity of divorce in England - - - **209**
See INTERNATIONAL LAW.

JURISDICTION—Action of damage by collision—Foreign public vessel — Exemption from arrest - - - - - - **270**
See SHIPPING. 12.

—— Divorce by New York Court, Decree of—Validity of divorce in England - **209**
See INTERNATIONAL LAW.

—— Divorce—Wife's petition—Desertion—Previous order of a Court of summary jurisdiction—Effect—No estoppel **326**
See DIVORCE. 7.

—— Notary public, Inherent jurisdiction for proper cause to strike, off roll of notaries - - - - - - **86**
See ECCLESIASTICAL LAW. 5.

—— Summary Jurisdiction (Married Women) Act, 1895—Effect of separation orders under that Act - - - - **189**
See DIVORCE. 4.

LEGITIMACY DECLARATION—Foreign domicil—Divorce in another State—Recognition by law of domicil—Effect—English law - - - - - - - **135**
See DIVORCE. 3.

LIFE CLAIMS—Shipping—Collision—Damage—Both to blame—Spanish law - **1**
See SHIPPING. 1.

LIGHTS—Collision—Steam trawler and sailing vessel - - - - - - 147
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LIMITATION OF LIABILITY — Collision — Charterer by demise—"Owners"- 34
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MARRIAGE—Dissolution of.
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See under HUSBAND AND WIFE.

MATRIMONIAL CAUSES ACT.
See under DIVORCE.

MERCHANT SHIPPING.
See under SHIPPING.

NONCONFORMIST—Church discipline—Officiating in nonconformist chapel in parish of another incumbent - - - 163
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NORWAY—Collision—Repatriation of seamen —Payment by consul—Norwegian law 153
See SHIPPING. 7.

NOTARY—Inherent jurisdiction for proper cause to strike notary public off roll of notaries—Discretion - - - 86
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NOTICE — Third party notice — Collision — Contract of indemnity - - 317
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ORDINATION — Church discipline — Pretended ordination of priest by incumbent of parish church, not being a bishop 163
See ECCLESIASTICAL LAW. 1.

"OWNERS"—Collision—Limitation of liability —Charterer by demise - - 34
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POWER OF APPOINTMENT—Divorce—Variation of settlements—Interest of child of dissolved marriage - - - 142
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PRACTICE — Appeal — Shipping casualty — Dealing with certificate — Costs of appeal - - - - - - 301
See SHIPPING. 13.

—— Divorce.
See under DIVORCE.

—— Ecclesiastical law.
See under ECCLESIASTICAL LAW.

—— Probate.
See under PROBATE.

PRIVATE INTERNATIONAL LAW.
See under INTERNATIONAL LAW.

PROBATE—*Practice—Administration—Grant to Official Receiver in Bankruptcy—Sureties dispensed with.*

In a case of a grant of administration to an official receiver in bankruptcy, who, as an official of the Board of Trade, had given security for the due performance of his duties, the Probate Court dispensed with sureties to the administration bond in the special circumstances of the case. IN THE ESTATE OF CAUSTON
Gorell Barnes, Pres. 124

2. —— *Practice—Administration with Will annexed—Sole Executrix incapable of acting—Joint Grant to Nominees of Sole Executrix—Court of Probate Act,* 1857 (20 *&* 21 *Vict. c.* 77), *s.* 73.

Where a sole executrix and universal legatee was incapable, owing to ill-health, of taking probate, the Court allowed a joint grant of administration, with the will annexed, to be taken by her nominees.

In the Goods of Roberts, (1858) 1 Sw. & Tr. 64, followed. IN THE ESTATE OF DAVIS
Bargrave Deane J. 330

RECEIVER—Administration—Practice—Grant to official receiver in bankruptcy — Sureties dispensed with - - 124
See PROBATE. 1.

REPATRIATION — Seamen — Shipping — Collision—Payment by consul—Norwegian law - - - - - - 153
See SHIPPING. 7.

ROLL—Notary public—Inherent jurisdiction for proper cause to strike notary public off roll of notaries—Discretion - - 86
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SALVAGE—Different risks to ship, cargo, and freight—Separate awards - - 263
See SHIPPING. 15.

—— Reopening appraisement—Basis of value—Practice - - - - - 339
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—— Shipping—Derelict—Award of total proceeds - - - - - - 145
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SEAMEN—Collision—Repatriation of seamen—Payment by consul—Norwegian law
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SEAWORTHINESS—Warranty of—Damage to cargo—"By reason of" fire - 282
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SEPARATION DEED — Allowance under — Divorce — Husband's petition — Order for costs against respondent - 331
See DIVORCE. 2.

SEPARATION ORDERS—Effect of, under Summary Jurisdiction (Married Women) Act, 1895 - - - - - 189
See DIVORCE. 4.

SETTLEMENTS — Variation of — Power of appointment—Interest of child of dissolved marriage - - - - 142
See DIVORCE. 6.

SHIPPING—*Collision—Damage—Both to blame—Life Claims—Spanish Law.*

As the result of a collision between a Spanish and a French ship on the high seas the Spanish

SHIPPING—*continued.*

vessel sank, and some members of her crew were drowned. At the usual reference following on an agreement equivalent to both to blame, a claim against the owners of the French ship by the owners of the Spanish ship under the Admiralty rule of division of loss, for a moiety of certain sums paid, under Spanish law, to the representatives of the deceased seamen, was admitted. On appeal:—

Held, by Sir Gorell Barnes, Pres., that the claim must be disallowed, for if it was in respect of a payment made by way of indemnity, under a foreign statute, independent of any question of negligence, it was not recognized by English law; and if it was a claim for damages for loss of life, it did not come within the scope of the Admiralty rule of division of loss. THE CIRCE - - - **Gorell Barnes, Pres. 1**

2. —— *Collision—Damage—Both to Blame.* On May 28, 1904, a collision occurred in the North Sea between the plaintiffs' and defendants' steamships, and on July 20, the solicitors for the respective parties signed an "agreement of settlement."

On January 17, 1905, the registrar made his report disallowing a claim made upon the plaintiffs, the owners of the *Hélène*, by the defendants, the owners of the *General Havelock*, for a moiety of the sum paid by them for loss of life on board the *Hélène*.

On appeal, Bargrave Deane J. affirmed the decision of the registrar. THE GENERAL HAVELOCK - - **Bargrave Deane J. 3, n.**

3. —— *Collision — Damage — Contract of Indemnity—Third Party Notice.*

A steamship was brought from the entrance of a dock to her berth by two tugs, and was made fast; but was unable to haul on her winches, so as to get completely into position alongside the quay, owing to a barge, attached to a buoy, being in the way. The dock master sent two men from the two tugs to loosen the barge's headfast, and directed a third tug to tow the barge away; but, in so doing, the barge was negligently allowed to come into contact with the propellor of the steamship, and sustained such damage that the barge sank with her cargo.

In an action of damage by collision brought by the barge owners against the dock owners, the dock owners admitted liability, but brought in the steamship owners as third parties liable to indemnify them under a towage contract made between the dock owners and a firm of ship repairers who had undertaken to bring the vessel from their yard to her berth at their risk. By the towage contract the dock owners were to supply tugs to assist in transporting the steamship within the dock on condition that the masters and crews of the tugs should cease to be under the dock owners' control in connection with the towage, and become subject to the orders and control of the master or person in charge of the vessel and be the servants of the owners thereof:—

Held, by Bargrave Deane J., that the steamship owners were not liable, as third parties, to indemnify the dock owners, as the contract to supply the two tugs was made with the ship repairers, and not with the steamship owners; but, whether that were so or not, the contract for the supply of the two tugs was at an end, and, therefore, the two men from the two tugs, directed by the dock master to loosen the headfast, had resumed their position as servants of the dock owners, and the action of the third tug under the direction of the dock master was independent of the transporting contract which applied only to the two tugs. THE KATE **Bargrave Deane J. 317**

SHIPPING—*continued.*

4. —— *Collision—Demurrage of Dredger—Measure of Damage.*

In ascertaining, on the principle laid down in *The Greta Holme*, [1897] A. C. 596, the measure of damage sustained by a dock board by reason of a collision with their dredger through the negligence of the defendants' servants, the Court will, in the absence of proof of direct pecuniary loss, and in respect of that part of the claim of the plaintiff board which is in the nature of demurrage, award such a sum as will be sufficient to compensate the board for the actual out-of-pocket expenses properly chargeable against the dredger during the period of her detention for repairs, together with depreciation and loss of interest on capital during the delay, such depreciation and interest being calculated on the capital value of the dredger at the time of the accident.

Decision of Gorell Barnes, Pres., [1906] P. 14, affirmed. THE MARPESSA - **C. A. 95**

5. —— *Collision—Limitation of Liability—Charterer by Demise—"Owners"—Merchant Shipping Act*, 1894 (57 *&* 58 *Vict. c.* 60), *ss.* 503, 504.

Charterers by demise are not "owners" within the meaning of s. 503 of the Merchant Shipping Act, 1894, and, therefore, cannot claim the benefit of limitation of liability in respect of loss or damage caused by the improper navigation of the ship by their servants. THE HOPPER No. 66 - - - **Bargrave Deane J. 34**

6. —— *Collision—Practice—Total Loss—Measure of Damage—Vessel under three successive Charters—Prospective Profits.*

The measure of damage in the case of a vessel totally lost by collision at a time when she is proceeding from a home port with cargo under charter to a foreign port, thence to proceed under charter to another port, and home under charter from that port, is her value at the date when she would have accomplished the homeward voyage, together with such a sum as will represent the profit which would have been realized under the three successive charters, less a reasonable percentage for contingencies. *The Kate*, [1899] P. 165, approved. THE RACINE - **C. A. 273**

7. —— *Collision—Repatriation of Seamen—Payment by Consul—Norwegian Law.*

By the Norwegian Maritime Code, if a ship is "lost," the expenses of sending home the master and crew are defrayed by the State, and, therefore, as such expenses do not ultimately fall upon the owners of the ship which is lost, they are not recoverable by them from the owners of the

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wrong-doing ship which caused the loss. THE CRAFTSMAN - - **Bargrave Deane J. 153**

8. —— *Collision—Steam Trawler and Sailing Vessel—Lights—Regulations for Preventing Collisions at Sea*, 1897, *Arts.* 2, 9, 20.

A British steam trawler of upwards of twenty tons gross register, fishing in the sea off the coast of Europe lying north of Cape Finisterre, and carrying the alternative lights prescribed by art. 9 of the Regulations for Preventing Collisions at Sea, as amended by Orders in Council, is, after getting in her trawl, so as to be no longer incumbered, but able to manœuvre, to be treated as a steam vessel under command, and, therefore, she is bound at night to exhibit the lights for a steam vessel prescribed by art. 2, and must, under art. 20, keep out of the way of a sailing vessel.

The Tweedsdale, (1889) 14 P. D. 164, followed. THE UPTON CASTLE - **Bargrave Deane J. 147**

9. —— *Damage to Cargo—"By Reason of" Fire—Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *s.* 502, *sub-s.* 1—*Warranty of Seaworthiness.*

Owing to the negligence of the crew in overheating a stove, a fire broke out on board the defendant's ship, and the plaintiffs' cargo was damaged. The plaintiffs alleged that the ship was unseaworthy in that the stove was placed too near to a bulkhead without any means of insulation, and, as the defendant must be taken to be "privy" to the position of the stove, he could not rely upon s. 502, sub-s. 1, of the Merchant Shipping Act, 1894, by which the owner of a British sea-going ship is not liable to make good any loss or damage happening "without his actual fault or privity" to goods damaged "by reason of fire on board the ship." Secondly, the plaintiffs contended that a great part of the damage was due to smoke and to the water used to extinguish the fire, which was not damage included in the statute:—

Held, by Bargrave Deane J., that the defendant could claim the statutory exemption from liability, for the stove was perfectly safe if properly used, and, therefore, the vessel was seaworthy, and the defendant not in fault or "privy" to the negligence of the crew. Secondly, that damage by smoke and by water used in putting out a fire is damage "by reason of" fire within the meaning of the statute. THE DIAMOND - - **Bargrave Deane J. 282**

10. —— *Damage to Cargo—Unseaworthiness—Bill of Lading—"All other Conditions as per Charterparty including Negligence Clause"—Incorporation of Exceptions by Reference.*

The plaintiffs' goods were carried under a bill of lading containing the words "all other conditions as per charterparty including negligence clause." A clause in the charterparty stated that "the steamer is in no way liable for the consequences of . . . . perils of the seas. . . . . Neither is the steamer answerable for losses occasioned by . . . . unseaworthiness, or latent defect in hull, machinery or appurtenances whether existing or not before or after the commencement of the voyage, not resulting from want of due diligence by the owners of the steamer, or by the ship's husband or manager . . . ."; and, by a further clause in the charterparty, the above clause was to be embodied in the bill of lading.

During the voyage damage was done to the plaintiffs' goods owing to a small crack in a deck plate which let the water through, and the plaintiffs alleged, and established in the Court below, unseaworthiness not covered by the exceptions incorporated in the bill of lading:—

Held, by the Divisional Court (Sir Gorell Barnes Pres., and Bargrave Deane J.), reversing the decision of the Court below, that the evidence shewed that bad weather was met with involving straining of the vessel sufficient to account for the crack in question, and, therefore, a prima facie case of perils of the seas had been made out, which the plaintiffs, upon whom the burden of proof rested, had failed to rebut. Secondly, that the bill of lading incorporated by reference the whole of the clause in the charterparty, including the exemption as to unseaworthiness, unless resulting from want of due diligence, of which there was no evidence. THE NORTHUMBRIA - - - **Div. Ct. 292**

11. —— *Harbour—Ship—Damage—Defective Berth—Duty of Harbour Authority—Duty of Wharf Owner.*

In an action by the owners of a steamship against trustees, in whom a harbour was vested by statute with the usual rights as to tolls, and duties as to maintenance, and against a railway company, owners of a wharf, to recover the amount of damage sustained by their vessel by reason of the defective condition of a berth alongside the wharf in the harbour, the defence on the part of the trustees substantially was that as they had not received any report from the local pilots, upon whom the duty was imposed by their by-laws of making periodical inspections and taking soundings, they had not been negligent in being unaware of the defective condition of the berth. Secondly, that the defect was due to the wrongful act of those in charge of a steamer throwing the stokehold refuse overboard immediately prior to the arrival of the plaintiffs' vessel, and, therefore, it was not reasonably possible for the trustees to be aware of the defect, as periodical inspections would not have detected it. The defence on the part of the railway company was that as the responsibility of keeping the berth in proper condition rested with the trustees, who they knew employed the pilots to take the necessary soundings, they were not negligent in being unaware of a defect due to a breach of the harbour by-laws by persons unknown:—

Held, by the Court of Appeal, affirming the decision of the Court below, that both defendants were liable—the trustees because they had negligently omitted to perform the duty laid down in *Mersey Docks Trustees* v. *Gibbs*, (1866) L. R. 1 H. L. 93, of taking reasonable care to see whether the harbour, including the berth in question, was in a fit condition, and they could not shift this duty on to the local pilots who were not their servants, and whose duty to sound was for the purpose of enabling them

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efficiently to navigate the vessels employing them. Secondly, assuming, without evidence, that the defect had been caused so shortly before the plaintiffs' vessel came in that periodical examinations would not have detected it, this defence was not open to them, because they had not performed their duty of examination of the berth by their servants, and, therefore, could not be heard to say that if they had done their duty the defect would not have been detected. The railway company was liable under the rule in *The Moorcock*, (1889) 14 P. D. 64, because as owners of the wharf they had invited the plaintiffs' vessel alongside for profit to themselves, and could not rely upon the pilots performing the duty cast upon them by the trustees, for, in their capacity as wharf owners, the railway company had the opportunity of ascertaining the condition of the berth, and should, therefore, have either satisfied themselves that it was reasonably fit, or warned those in charge of the vessel that they had not done so. THE BEARN - - - - **C. A. 48**

12. —— *Jurisdiction—Action of Damage by Collision—Foreign Public Vessel—Appearance Entered under Misapprehension — Exemption from Arrest.*

Process by way of arrest in a damage action in rem does not lie against a vessel the property of a foreign sovereign State and destined to its public use, and, therefore, on the application of the foreign Government, and the production of a certificate from the Foreign Office as to the public character of the vessel in question, all proceedings will be stayed and no waiver of the privilege assumed, although during the temporary presence of the vessel in this country, and under a misapprehension, in order to procure her release, agents of the Government to which the vessel belonged have given an undertaking to put in bail, and have entered an absolute appearance.

The Parlement Belge, (1880) 5 P. D. 197, followed. THE JASSY

Gorell Barnes, Pres. 270

13. —— *Practice—Appeal—Shipping Casualty—Loss of Life — Suspension of Certificate— "Wrongful act or default" — Dealing with Certificate—Conduct of Case by Board of Trade —Costs of Appeal — Merchant Shipping Act*, 1894 (57 *&* 58 *Vict. c.* 60), *ss.* 470, *sub-s.* 1 (*a*); *ss.* 474, 475—*Shipping Casualties Rules*, 1895, *rr.* 11, 12, 13, 20 (*i*).

At the conclusion of the evidence in a formal investigation into the circumstances attending the loss of a British ship whereby loss of life ensued, the Board of Trade desired the opinion of the Court on (inter alia) the question whether the loss of the vessel and the loss of life was caused by the wrongful act or default of the master; but the Board declined to say whether the certificate of the master should be dealt with. The Court found that the loss of life was conduced to by the wrongful acts and default of the master, and suspended his certificate for twelve months. A Divisional Court, sitting in Admiralty by way of appeal, came to the conclusion that the certificate ought to be returned

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to the master as the evidence did not sufficiently establish that the loss of life was caused by his wrongful act or default, and the Divisional Court, under the discretionary powers conferred upon it by the Shipping Casualties Rules, 1895, r. 20 (*i*), ordered the Board of Trade to pay the costs of his successful appeal, on the ground that the Board should have assisted the Court below by intimating whether in their opinion on the evidence the certificate should be dealt with. THE CARLISLE - - - **Div. Ct. 301**

14. —— *Salvage—Derelict—Award of total Proceeds.*

A derelict barque, dismasted and on fire, was towed by a tug some twenty miles into Harwich, where the salvors succeeded in extinguishing the fire and placing the barque in safety. The vessel and her cargo were ultimately sold by the Court, realizing 255*l.*, less 108*l.* expenses of the marshal. There was also a liability of 88*l.* for the assistance rendered to the salvors by others after the vessel was brought in, and a further liability of 21*l.* 17*s.* 9*d.* for dock dues, reducing the net balance to 37*l.* 2*s.* 3*d.*

In an action against the owners of the barque, her cargo and freight, the plaintiffs, the owner, master and crew of the tug, claimed salvage remuneration, and, judgment having been allowed to go by default, the Court awarded the total proceeds without a reference. THE LOUISA - - **Bargrave Deane J. 145**

15. —— *Salvage—Different Risks to Ship Cargo, and Freight—Separate Awards.*

A Norwegian steamship bound to Hull with fresh herrings ran short of coal when some hundred miles north-east of the Spurn, and was towed into the Humber by a steam trawler. The Court awarded the salvors 600*l.*; but regarding the substantial service as rendered to the perishable cargo, divided this sum into 180*l.*, as against the ship, valued at 1875*l.*, and 420*l.* as against the cargo and freight, valued at 1060*l.* and 136*l.* respectively. THE VELOX

Gorell Barnes, Pres. 263

16. —— *Salvage — Practice — Reopening Appraisement—Basis of Value.*

The principle adopted in *The Harmonides*, [1903] P. 1, in the case of a damage action, is applicable to a salvage action, so that if, in the absence of agreement, or of the acceptance of the affidavit of value filed by the defendants, an appraisement is applied for, the value to her owners in her damaged condition on the completion of the salvage service is the basis on which the appraisement of the salved vessel is to be made, and under ordinary circumstances such an appraisement is conclusive. THE HOHENZOLLERN - - - - **Bargrave Deane J. 339**

17. —— *Wages—Agreement with Crew—End of Voyage—Election by Master—Merchant Shipping Act*, 1894 (57 *&* 58 *Vict. c.* 60), *s.* 114, *sub-s.* 2 (*a*), *s.* 115, *sub-s.* 5.

A fireman signed articles of agreement for a "voyage not exceeding one year's duration, to any ports or places within the limits of 75 degrees north, and 60 degrees south, latitude, commencing at Cardiff, proceeding thence to

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Malta, thereafter trading to ports in any rotation and to end at such port in the United Kingdom or continent of Europe, within home trading limits, as may be required by the master."

The vessel left Cardiff for Malta, thence she proceeded to the Black Sea, where she loaded a grain cargo to be wholly discharged at Southampton, and, on arriving at the last-mentioned port, the fireman claimed his wages and discharge on the ground that the voyage and the agreement were at an end. The master required the fireman to go on with the vessel to Cardiff :—

Held by the Court of Appeal (Vaughan Williams, Stirling and Fletcher Moulton L.JJ.), reversing the decision of Bargrave Deane J., that, on the true construction of the clause, the master was entitled to require the fireman to go on to Cardiff, for the discharge of the cargo at Southampton did not determine the agreement as the voyage was that of the ship and not of the cargo, a succession of which was contemplated, and by giving the master a right of election as to which of the ports, within the limits of the prescribed district, should, within the period of twelve months, in fact be the final port of destination of the ship, the agreement did not contravene the provisions of s. 114, sub-s. 2 (*a*), of the Merchant Shipping Act, 1894. THE SCARSDALE - - - - - - **C. A. 103**

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